Docket for 04-368

(13)

No. 04-368
Title: Arthur Andersen LLP, Petitioner
v.
United States
Docketed: September 15, 2004
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (02-21200)
Decision Date: June 16, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 14 2004	Petition for a writ of certiorari filed. (Response due October 15, 2004)
Sep 27 2004	Waiver of right of respondent United States to respond filed.
Sep 29 2004	DISTRIBUTED for Conference of October 15, 2004.
Oct 7 2004	Response Requested . (Due November 8, 2004)
Nov 3 2004	Order extending time to file response to petition to and including December 8, 2004.
Nov 9 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Dec 8 2004	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Dec 8 2004	Brief of respondent United States in opposition filed.
Dec 8 2004	Brief amici curiae of Washington Legal Foundation and Chamber of Commerce of the United States filed.
Dec 21 2004	Reply of petitioner Arthur Andersen LLP filed. (Distributed)
Dec 22 2004	DISTRIBUTED for Conference of January 7, 2005.
Jan 7 2005	Petition GRANTED.
Feb 11 2005	Record received from U.S.C.A. 5th Circuit. (1 box)
Feb 17 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Feb 22 2005	SET FOR ARGUMENT ON Wednesday, April 27, 2005.
Feb 22 2005	Joint appendix filed.
Feb 22 2005	Brief of petitioner Arthur Andersen LLP filed.
Feb 22 2005	Brief amici curiae of Washington Legal Foundation and Chamber of Commerce of the United States filed.
Feb 22 2005	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Feb 22 2005	Brief amicus curiae of New York Council of Defense Lawyers filed.
Feb 22 2005	Brief amicus curiae of American Institute of Certified Public Accountants filed.
Feb 23 2005	Record received from U.S.D.C. for Southern Dist. of Texas. (4 boxes) A portion of this record is sealed.
Mar 11 2005	CIRCULATED.
Mar 29 2005	Brief of respondent United States filed. (Distributed).
Apr 20 2005	Reply of petitioner Arthur Andersen LLP filed. (Distributed)
Apr 27 2005	Argued. For petitioner: Maureen E. Mahoney, Washington, D.C. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C.

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No.

In the Supreme Court of the United States

ARTHUR ANDERSEN LLP,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Arthur Andersen LLP's conviction for witness tampering under 18 U.S.C. § 1512(b) must be reversed because the jury instructions upheld by the Fifth Circuit misinterpreted the elements of the offense, in conflict with decisions of this Court and the Courts of Appeals for the First, Third, and D.C. Circuits.

RULE 29.6 STATEMENT

Petitioner Arthur Andersen LLP is a limited liability partnership. It has no parent corporation and no publicly held company owns stock in the partnership.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit (Pet. App. 1a-34a) is reported at 374 F.3d 281.

JURISDICTION

The Fifth Circuit affirmed the conviction on June 16, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix (Pet. App. 63a-77a) reproduces the text of 18 U.S.C. §§ 1503, 1505, 1512, and 1515.

STATEMENT OF THE CASE

This case arises out of the conviction of Arthur Andersen LLP ("Andersen") for encouraging its employees to comply with the firm's standard document retention policy during the four-week period that preceded the SEC's initiation of a formal proceeding concerning Enron Corporation in 2001. That policy required Andersen employees to prepare and retain final work papers sufficient to fully and accurately document their audit conclusions, and then to discard unnecessary drafts and notes. Andersen employees who compiled the Enron work papers did not seek to excise damaging facts or to conceal knowledge of a crime, and they genuinely believed that compliance with the policy prior to initiation of an SEC proceeding and receipt of a subpoena was lawful and proper.

For more than a century, it had been settled law that destruction of documents prior to the initiation of judicial or agency proceedings is not obstruction of justice. The Government accordingly sought to circumvent the limits on the crime of obstruction by indicting Andersen for "witness tampering" under 18 U.S.C. § 1512, which prohibits attempts to "kill," "threaten," or "corruptly persuade" potential witnesses. In the Government's view, it was perfectly lawful for Andersen's employees to comply with the document retention policy themselves, whatever their motive might be, prior to the start of a proceeding. But it

was criminal "corrupt[] persua[sion]" to remind *others* about the policy if the reminder was even partially motivated by an intent to "impede the fact-finding" of some possible future investigation. The Fifth Circuit agreed. That expansive interpretation of the statutory language cannot be reconciled with this Court's precedents, has been squarely rejected by three circuits, and criminalizes conduct undertaken without any consciousness of wrongdoing. Arthur Andersen did not commit a crime.

Proceedings In The District Court

1. Andersen was indicted on March 7, 2002, in the Southern District of Texas. R. 8.[1] The indictment charged a single count of obstruction of justice, alleging that between October 10, 2001, and November 9, 2001, Andersen "corruptly persuade[d]" its employees to destroy documents with the intent to impair their availability in an "official proceeding[]," in violation of 18 U.S.C. § 1512(b)(2) (2000). R. 1-2. The trial began on May 6, 2002, and the case was submitted to the jury on June 6, 2002.

The jury regarded the case against Andersen as close and difficult. It deliberated for seven full days, repeatedly sought guidance from the court, and then declared itself deadlocked. Tr. 6695, 6711, 6719-20, 6723, 6743, 6795. The court delivered an *Allen* charge and the jury resumed deliberations. Three days later, the jury returned a guilty verdict. Pet. App. 2a.[2]

2. The jury was charged on June 5, 2002. Tr. 6326-49. Andersen objected to the court's instructions concerning two key elements of the offense.[3] First, the court instructed

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[1] Citations to "R." refer to the record filed in the Fifth Circuit. Citations to "Tr." refer to the trial transcript in the district court.

[2] Andersen has ongoing business operations and continues to suffer adverse consequences from the conviction. It is also actively defending more than a hundred civil actions against the firm and former partners for billions of dollars in alleged damages arising out of its representation of Enron. The conviction prejudices Andersen's defense of these and other civil actions and has been used by insurers to contest coverage.

[3] The statute authorized ten years imprisonment if the defendant

the jury that the term "corruptly persuades" means persuasion partially motivated by an "improper purpose" to "subvert, undermine, or impede the fact-finding ability of an official proceeding" even if "Andersen honestly and sincerely believed that its conduct was lawful." Pet. App. 48a, 49a. Andersen repeatedly objected to the court's determination that "corrupt" persuasion could be equated with an "improper purpose," and argued that the term requires proof of improper means of persuasion or inducement to unlawful acts, or at least conscious wrongdoing. *See* R. 431, 440, 912, 917; Tr. 4317.

Second, the district court instructed the jury that the term "official proceeding" included the SEC's performance of any "investigative functions[]" whether "formal [or] informal." Pet. App. 47a. Andersen objected because neither the statutory definition nor the SEC's own regulations can be read to include informal investigations conducted by the staff, which has no power to subpoena documents or compel testimony. R. 426-29.[4] In addition, Andersen proposed instructions designed to ensure that the jury would be required to find a close nexus between an employee's reminder to follow the document retention policy and any future SEC proceeding. R. 148, 424-26, 938-39; Tr. 4339-45. The district court instead instructed the jury that

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"knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ... cause or induce any person to ... alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(b)(2)(B) (2000). The official proceeding "need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(e)(1) (2000).

[4] *See* 18 U.S.C. § 1512(b) (prohibiting, *inter alia*, interference with "testimony" and "summons[es]" in an "official proceeding," which is defined in § 1515(a)(1)(C) as a "proceeding *before* a Federal Government agency" (emphasis added)); 17 C.F.R. § 201.101(a)(1), (4), (7), (9) (defining an SEC "proceeding" only to mean an "agency process initiated ... [b]y an order instituting proceedings," which requires a vote of the Commissioners).

the Government did not have to prove that the "corrupt persuader" had any particular proceeding in mind or knew that a future subpoena was likely.[5]

Evidence at Trial

The Fifth Circuit's opinion summarizes portions of the record that the jury might have relied upon to conclude that an Andersen employee persuaded a co-worker to follow the document retention policy, at least in part, for the purpose of "imped[ing] the fact-finding" of a future SEC proceeding.[6] Andersen's appeal, however, did not dispute that the evidence was sufficient to support this conclusion. Andersen instead contended that its conviction must be reversed under any correct interpretation of the statute because no error in the instructions at issue here could be harmless. The record evidence would require, or at the very least permit, the conclusion that no Andersen employee used improper methods of persuading coworkers, solicited conduct that was itself unlawful, had knowledge that a crime had been committed, engaged in conscious wrongdoing, or even believed that an SEC subpoena was probable at the time of the relevant conduct. Because the Fifth Circuit had no need to thoroughly evaluate such evidence due to its far-reaching interpretation of the statute, the following supplements the Court's statement of facts in order to illuminate the importance of these instructional issues.

1. Andersen was responsible for auditing Enron's publicly filed financial statements. The firm's "engagement team" for the Enron account in 2001 was led by David Duncan. During the summer and fall of 2001, Andersen

[5] The jury was told: "The Government *need only prove* that Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, that is, a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served." Tr. 6345 (emphasis added).

[6] The district court properly instructed the jury that Andersen could only be found liable if one of its employees violated § 1512(b) and the Fifth Circuit's opinion focuses only on the conduct and intent of David Duncan and Nancy Temple (who was never indicted). Pet. App. 47a, 4a-7a.

learned of potential problems with Enron's financial statements and formed a team to evaluate and resolve those issues. Pet. App. 4a. This team included some of the firm's most respected auditors, as well as Nancy Temple, an in-house lawyer in Chicago and former partner at Sidley & Austin. At the time, the team was principally concerned with the discovery that Andersen had permitted Enron to use an improper accounting methodology to measure potential impairment of notes received from entities known as the Raptors. Pet. App. 3a-4a. The error concerning the Raptors' accounting could have potentially required a restatement of Enron's income statements, but that question could not be resolved without first evaluating the results of alternative methodologies. Tr. 1794.

On October 9, 2001, Nancy Temple prepared notes stating that "some SEC investigation" was "highly probable" but that there was merely a "reasonable possibility" of a "restatement." Pet. App. 5a; GX NT-1009.[7] Andersen employees explained that they considered some SEC inquiry concerning Enron to be likely, but that they did not believe that the SEC would institute a formal proceeding and issue a subpoena for Andersen's documents unless Enron's income for prior years had to be restated. Tr. 1445-49, 1904-05, 5896, 6087. An SEC official confirmed at trial that this expectation was correct; the agency was not planning to request documents from Andersen unless Enron restated its income. Tr. 783-84.

On October 12, Temple entered the Enron matter into Andersen's internal tracking system and under the category of "Type of Potential Claim" she selected the designation "Professional Practice—Government/Regulatory Investigation" from a list of several options. The entry included a notation, however, that the firm was still uncertain whether a restatement would be necessary. GX 928B.2. Temple sent an email to the Practice Director for Andersen's Houston

[7] Citations to "GX" refer to the government's exhibits in the district court. "DX" refers to Arthur Andersen's exhibits in the district court.

office that day, stating that "[i]t might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy."[8] GX 1012A. The Practice Director forwarded her email to David Duncan.

On October 16, 2001, Enron released its third quarter results which disclosed a $1.2 billion restatement of its balance sheet. Pet. App. 5a. In Andersen's experience, a balance sheet restatement (in contrast to an income restatement) would not lead to a formal SEC investigation. Tr. 6195-98. Consistent with Andersen's expectation, the SEC sent a letter to Enron advising that it had opened an *informal* investigation; the letter did not seek documents from Andersen. GX 1017B. Andersen learned of the letter on October 19. Pet. App. 6a. The Enron consultation group had a conference call the following Saturday morning. A witness testified that Temple reminded participants "to make sure to follow the policy." *Id.*[9]

2. On October 23, Duncan scheduled a meeting in Houston where he "directed the engagement team to comply with Andersen's records retention policy." Pet. App. 6a. Copies of the document retention policy were distributed at the meeting. Andersen's policy required its personnel to *retain* all information of importance to an audit in order to ensure that the firm's work papers would fully and completely document Andersen's work. GX 160A at ¶¶ 2.0, 3.1, 3.4.1, 3.6, 3.6.1. Once the pertinent information was fully documented, the policy required "related

[8] Temple had been advising the engagement team that completed memos relating to the Raptors' impairment issue should be preserved in their original form under the terms of the policy and corrections should be documented in supplemental memoranda. Tr. 2440-41; GX NT1009.

[9] The witness explained that "[i]n my mind" this suggestion was "a follow-on from the conversations that we had had earlier about the need to ... get accurate documentation into the record." Tr. 1471. She also testified that the participants only anticipated a "Comment Letter" from the SEC, and that those letters *never* request access to an accounting firm's documents. Tr. 1447-49.

information," such as duplicates, drafts, and notes, to be shredded to protect the confidentiality of client financial information. *Id.* at ¶ 3.5.3. The policy further stated that this "related information should not be destroyed" after the firm was "advised of litigation or subpoenas regarding a particular engagement." *Id.* at ¶ 4.5.4.

Although David Duncan pled guilty to witness tampering and was required to cooperate with the Government at Andersen's trial, his testimony demonstrated that, at a minimum, the jury could have found that neither he nor anyone else involved in the efforts to comply with the document retention policy sought to ferret out harmful information or engage in conscious wrongdoing. Duncan acknowledged that he thought there was some "potential" that the "SEC might want some of our documents" (Tr. 2478-80) and that this "potential" was "on my mind at the time I instructed people to do this." Tr. 1907-08.[10] But he also told the jury that he believed that compliance with the policy "was all entirely appropriate until when I received a subpoena." Tr. 1909. He explained that he requested the team to "come into compliance with the policy," not to "do any more or any less," and to "refer to the policy to make sure they understood it." Tr. 1891-92, 2602. Duncan also told the jury that he regarded a "large part of the exercise" as "mak[ing] sure we [had] the complete picture [in the workpaper documents] ... in case the SEC wants to look at this one day." Tr. 2482.

Employees who attended the meeting understood that the SEC was conducting an informal investigation of Enron; they nevertheless told the jury that they shared Duncan's view that it was proper to comply with the policy at this time. *See, e.g.*, Tr. 1909, 3330-31, 3350, 4900. Witnesses

[10] Duncan never testified that he expected an SEC subpoena or considered it "probable." Instead, he repeatedly testified that he believed it was no more than a "possibility" until early November. *See* Tr. 1904, 1905-08, 2480. Other Andersen witnesses shared that view. *See, e.g.*, Tr. 6097 (former SEC official); Tr. 1447-49 (SEC head of Andersen Professional Standards Group).

testified that, consistent with Duncan's guidance, they attempted to "complet[e] [the] audit documentation" by "making sure everything that went into the accounting issues and the conclusion was documented and available in the work papers." Tr. 4918. The concern was "one of inclusion rather than exclusion." *Id.* Although the team shredded nearly "two tons of paper" in the process of reviewing the files (Pet. App. 6a), employees testified that they did not seek to destroy or fail to preserve any harmful information.[11] As one manager explained, once an audit file had been properly compiled, "it's all in the audit work papers" so "you don't need" anything else. Tr. 3336. Indeed, the Government was unable to identify a single harmful document that was not ultimately produced to the SEC. Efforts to comply with the document policy continued until November 8, 2001, when the SEC issued a subpoena to Andersen for Enron-related documents. Pet. App. 6a-7a.[12]

3. The SEC subpoena was issued the same day that Enron filed a restatement reducing its net income for the years 1997-2000 by $586 million. Tr. 4583, GX 1040A. This restatement, however, was *not* attributable to accounting issues associated with the Raptors' issues Andersen had been reviewing. When Andersen applied the proper methodology for the Raptors, it was determined that no restatement was necessary. Tr. 4528-33, 5645-46. And Duncan testified that he was fairly sure by October 16, 2001—more than a week before he discussed the document retention policy with his staff—that a restatement would

[11] Andersen proffered evidence at trial that the volume of shredded documents represented less than 3% of the records retained by the engagement team. Tr. 5468-71; R. 1115-16. The district court held this evidence inadmissible and the Fifth Circuit affirmed. Pet. App. 7a-9a.

[12] The SEC sent a second letter to Enron on October 30, 2001. Pet. App. 6a. The Court's opinion erroneously states that the letter "request[ed] accounting documents." *Id.* The letter requested Enron make certain public disclosures; it did not request documents. GX 1030A; Tr. 1945. The Government did not, in any event, identify any acts of "corrupt[] persua[sion]" that occurred after this letter was sent.

not be required due to the use of the wrong impairment methodology for the Raptors. Tr. 1794-95.

On November 2, 2001, however, Andersen learned for the first time that Enron had withheld information from it concerning an entity known as Chewco. Tr. 6148-49. Andersen immediately investigated the facts and informed Enron on November 5, 2001 that a restatement of earnings would be required due to the Chewco information. Tr. 5920-23. Thus, a properly instructed jury could have found that requests by Nancy Temple and David Duncan to comply with the document retention policy preceded the date when they learned that a restatement of the income statements (and thus a formal SEC investigation) was likely.

4. Based on this record, a jury also could not find that Andersen employees corrupted coworkers by persuading them to commit independent violations of the law. All of the requests by Andersen employees for compliance with the policy preceded the date when the SEC commenced an "official proceeding," by instituting a formal investigation. Tr. 505-08; *see* 18 U.S.C. § 1505 (limiting the crime of obstruction to destruction of documents during "pending" agency proceedings). Nor did the Government prove that soliciting compliance with the policy constituted an unlawful effort to conceal knowledge of a crime.[13] Andersen employees testified that they did not believe that Enron had engaged in criminal conduct until early November when they learned that Enron had withheld material information from Andersen concerning Chewco. *See, e.g.*, Tr. 1950. Indeed, the Government has charged Enron executives with misleading Andersen during the course of the audit.[14] To this day, neither Andersen nor any of its partners have ever been charged criminally or by the SEC with violations of the

[13] *See* 18 U.S.C. § 3 (penalizing a person who "knowing that an offense against the United States has been committed ... assists the offender in order to hinder or prevent his apprehension, trial or punishment").

[14] Superseding Indictment at 49-53, *United States v. Causey*, No. H-04-25 (S.D. Tex. July 7, 2004); *see also* Second Amended Complaint at 45-47, 50-51, *SEC v. Lay*, No. H-04-0284 (S.D. Tex. July 8, 2004).

securities laws in connection with their work for Enron.

Proceedings On Appeal

On appeal, Andersen renewed its challenges to the jury instructions and the Fifth Circuit concluded that the district court properly interpreted the elements of the offense.

1. The Fifth Circuit held that it would join the "majority of circuits ... defining 'corruptly' in terms of improper purpose despite the dim light it casts upon its meaning, its circularity aside." Pet. App. 19a. The Court recognized that the Third Circuit had squarely held that the term "corruptly" in § 1512(b) cannot be defined as an "improper purpose" but was "unwilling to follow the Third Circuit's lead in imposing a requirement for an additional level of culpability on Section 1512(b)." *Id.* at n.17.

The Fifth Circuit justified its decision to adopt a "circular[]" definition that casts only a "dim light" on the meaning of the most critical term in a criminal statute based upon legislative history that does not even include a direct endorsement of the Court's definition. Pet. App. 19a, 22-23a. And it rejected the Third Circuit's view that the term "corruptly" is "'render[ed] ... surplusage'" if defined to mean only the "improper purpose" of "'hinder[ing] communication to law enforcement.'" Pet. App. 19a n.17, 20a (quoting *United States v. Farrell*, 126 F.3d 484, 490, 487 (3d Cir. 1997)). The Court recognized that § 1512 specifically requires an "'intent to impair the ... integrity or availability [of an object] for use in an official proceeding'" *in addition to* "corrupt[]" persuasion. Pet. App. 21a. It nevertheless concluded that an "intent to impede the fact-finding" of an agency proceeding "implies a degree of personal culpability beyond a mere intent to make documents unavailable" for use in that proceeding. *Id.* at 21a-22a.[15]

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[15] The Court also states that the failure to require the jury to find a "violation of an independent legal duty" should be regarded as "harmless error." Pet. App. 24a-25a. But its explanation indicates that it only meant that "corruptly" is not mere surplusage. The government never argued—at trial or on appeal—that any Andersen employee was requested to commit an independent violation of the law or that the verdict could be upheld if the jury instruction on "corruptly persuades" was erroneous. *See* Brief for the United States at 73-92 (May 27, 2003).

The Fifth Circuit also rejected Andersen's further argument that "[c]onduct undertaken with a genuine belief that it is proper is not 'corrupt.'" Brief of Appellant at 67 (Mar. 24, 2003). The Court recast the argument as a request for an "'ignorance of the law' instruction," and rejected it on the ground that "knowledge of one's violation is not an element of § 1512(b)(2)." Pet. App. 29a.

2. The Fifth Circuit also rejected Andersen's challenge to the "official proceeding" instructions. It recognized that it had previously described the nexus mandated by § 1512 to require proof of an "'intent to affect ... some particular federal proceeding that is ongoing or is scheduled to be commenced in the future.'" Pet. App. 26a (quoting *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir.), *cert. denied*, 501 U.S. 1209 (1991)). It nevertheless characterized that statement as "dicta," *id.*, and held that no proof of nexus to a particular proceeding is required. It also concluded that this case was "tried on the theory" that Andersen intended to impede "a proceeding of the SEC." *Id.* at 27a-28a.

The Court did not address Andersen's further argument that the instructions erroneously defined an "official proceeding" to include informal SEC investigations, and thereby required the jury to find that Andersen knew that an "official proceeding" of the SEC had already begun at the time of the alleged acts of "corrupt[] persua[sion]." Even though the Court elsewhere appears to adopt Andersen's view that "[p]ossible proceedings" only "became a reality on November 8, 2001" when Andersen received a subpoena, Pet. App. 5a, it never explains why this instructional error, which the Government never even contended was harmless, did not require reversal of the conviction.

REASONS FOR GRANTING THE WRIT

This Court has held for more than a hundred years that Americans are not required to retain every document that comes into their possession that might, at some point, be of

interest to a government investigation—and that disposing of such documents prior to the actual initiation of judicial proceedings is not "corrupt" behavior punishable as obstruction of justice, because "a person lacking knowledge of a pending proceeding necessarily lack[s] the evil intent to obstruct." *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (citing *Pettibone v. United States*, 148 U.S. 197, 207 (1893)). That fundamental principle is reflected in the document retention policies adopted by virtually every American corporation or professional firm of any size. The United States recognized that under these basic principles it simply was not obstruction of justice for Arthur Andersen to dispose of any of these documents when it did. Indeed, the United States has essentially conceded that the persons who discarded these documents committed no crime whatsoever.

In its zeal to convict Andersen of something in the wake of Enron's collapse, the United States therefore instead charged Andersen with "witness tampering," on the remarkable theory that it is inherently "corrupt" criminal behavior in this country to attempt to *persuade* another person to engage in perfectly lawful conduct, if one of the objects of that persuasion is to frustrate the fact-finding ability of a potential future government proceeding. Although it was perfectly lawful for Andersen to have a document retention policy that preserved only the final audit workpapers, and perfectly lawful for Andersen's employees and professionals to follow that policy, the United States argued that it was somehow a serious felony for Andersen's in-house attorney and supervisors to remind its employees of the policy—even if they honestly and sincerely believed that their own speech was entirely lawful, and even if there was not the slightest hint of coercion, intimidation, or bribery in their persuasive speech.

The Fifth Circuit endorsed that novel theory only by torturing the language of the witness tampering statute, and by disregarding two fundamental Due Process principles: that ambiguities in criminal statutes are always resolved in favor of the defendant, and that no one may be

convicted of a crime without fair notice that their conduct was criminal. The Fifth Circuit's holding deepens an existing, acknowledged circuit split. It also works a sea change in the law of obstruction of justice, posing serious risks of prosecution for virtually every company that maintains a document retention policy—as well as for a wide range of other conduct commonly regarded as lawful and even constitutionally protected. And it unjustly destroyed a proud and venerable American institution: a professional accounting firm that served leading American companies for nearly a century, and, with the Andersen member firm network, once employed more than 85,000 people.[16]

This decision has been very closely watched, will be enormously influential, and is profoundly wrong. And the Fifth Circuit's suggestion that the core meaning of this important criminal statute can be deferred to future case-by-case development deprives firms of the clear rules so essential to the fair administration of the criminal law. Certiorari is warranted.

I. THE FIFTH CIRCUIT'S INTERPRETATION OF § 1512 DEEPENS AN EXISTING CIRCUIT SPLIT AND CANNOT BE RECONCILED WITH THIS COURT'S PRECEDENTS

A. The Fifth Circuit's Analysis Conflicts With A Century Of Precedent Interpreting The Federal Obstruction Statutes

1. An overview of the history and interpretation of the general federal obstruction statutes helps to place the Fifth Circuit's decision in its proper jurisprudential context.

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[16] The United States has never charged Andersen, or its partners, with any offense relating to the quality of its accounting on the Enron matter, and academic commentators have noted that Andersen in fact had the *lowest* rate of restatements among the major accounting firms from 1997 to 2001. Theodore Eisenberg & Jonathan R. Macey, Was Arthur Andersen Different? An Empirical Examination of Major Accounting Firms' Audits of Large Clients, Research Paper No. 287, at 14 (2003) (unpublished manuscript, on file with Yale Law School), *available at* papers.ssrn.com/abstract=468761

18 U.S.C. § 1503. The basic federal obstruction of justice statute, 18 U.S.C. § 1503, has two clauses.[17] The first prohibits "corrupt" or coercive efforts to "influence, intimidate, or impede" jurors and other actual officers of a court. (That clause once covered witnesses, but no longer does.) The second "omnibus" clause more broadly prohibits all "corrupt[]" or coercive attempts "to influence, obstruct, or impede, the due administration of justice."

For more than a century, however, this Court has consistently interpreted § 1503 to apply only when a judicial proceeding is actually pending, the defendant knows it, and the defendant specifically intends to obstruct that proceeding. This Court held as early as *Pettibone v. United States*, 148 U.S. 197, 207 (1893), that "while, with knowledge or notice of [a pending proceeding], the intent to offend accompanies obstructive action, *without such knowledge or notice the evil intent is lacking.*" (Emphasis added.) A defendant who intentionally interferes with a mere police investigation (whether by lying to the police, destroying documents, or misleading or bribing potential witnesses) therefore "necessarily lack[s] the evil intent to obstruct" justice, *Aguilar*, 515 U.S. at 599, unless he knows that a judicial proceeding is pending and intended to obstruct *it*.

The facts of *Aguilar* demonstrate how carefully this Court has protected that line between mere interference with the government's investigative fact-finding ability, and corrupt obstruction of justice. The defendant in *Aguilar* was a federal judge who intentionally lied to FBI agents interviewing him about leaks concerning a federal wiretap. Aguilar asked the agents if he was the target of a grand jury investigation, and they confirmed that "[t]here is a Grand Jury meeting" and that "some evidence will be heard ... I'm sure on this issue." *Id.* at 600. Nonetheless this Court reversed the conviction, holding that Judge Aguilar

[17] The statute now codified as § 1503 derives from similar federal statutes on the books since 1831. *See United States v. Poindexter*, 951 F.2d 369, 380 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992).

"necessarily lacked the evil intent to obstruct," *id.* at 599, despite the jury's verdict, because there was no evidence that he knew that those particular FBI agents would ever testify before the grand jury. Of course there is always a strong possibility that FBI agents will convey information to a sitting grand jury, and Judge Aguilar certainly knew that. But this Court stressed that the fact that the agents "might or might not" ultimately give testimony was not sufficient to make his deliberate deception a criminal act. *Id.* at 600.

That requirement of a close "nexus" between the defendant's conduct and a pending proceeding is a crucial part of the *mens rea* for obstruction of justice. *Id.* at 599. It is also essential to the constitutionality of the statute. A pending judicial proceeding helps to supply fair warning of potential criminality, because intentional interference with a pending proceeding is more commonly understood to be *malum in se*. Outside that context, individuals often pursue a wide range of conduct designed "to impede the fact-finding ability" of some potential proceeding, based on a common understanding that such conduct falls within the bounds of legitimate self-defense under the law. In the absence of a specific duty imposed by a subpoena or the unambiguous command of a statute, there is nothing inherently corrupt about failing to facilitate a future government inquiry. That is a hallmark of a free society and the reason that our legal system is frequently described as "adversary." This Court specifically rejected the notion, urged by the dissent in *Aguilar*, that "*any* act, done with the intent to 'obstruct ... the due administration of justice,' is sufficient to impose criminal liability." *Id.* at 602. This Court reasoned that such a rule would criminalize conduct when "culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability." *Id.*

It is also significant that § 1503 was long used to prosecute witness tampering, but was not understood to criminalize polite requests to engage in lawful conduct. *See infra*, 23-24 & n.23. As the D.C. Circuit explained after

reviewing the history, "[m]any interpretations of the statutory language in general, and of the term 'corruptly' in particular, have been suggested, but most converge" on a reading that "would reach only a person who, for the purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty." *Poindexter*, 951 F.2d at 385.

18 U.S.C. § 1505. A parallel statute punishes anyone who "corruptly, or by threats or force, ... endeavors to influence, obstruct, or impede ... any pending proceeding ... before any department or agency of the United States," such as the SEC. It expressly requires both a "pending proceeding" and proof that the conduct was "corrupt."

18 U.S.C. § 1512. The statute directly at issue here was added as part of the Victim and Witness Protection Act of 1982 ("VWPA"), Pub. L. No. 97-291, 96 Stat. 1248. Section 1512 broke with prior law by permitting prosecution for witness tampering when no "official proceeding" was yet pending. As originally enacted, however, § 1512 prohibited only the use of force, threats, intimidation, or deception with the intent to interfere with a federal proceeding. And because the VWPA also amended § 1503 to delete any reference to witnesses, the Second Circuit concluded that witness tampering could henceforth be prosecuted *only* under § 1512—and that non-coercive, non-misleading conduct therefore was no longer a crime at all, even if it involved plainly wrongful acts like urging or even bribing a witness to lie to an already pending proceeding. *See United States v. Hernandez*, 730 F.2d 895 (2d Cir. 1984).

In response, Congress amended § 1512 to punish anyone who "knowingly uses intimidation or physical force, threatens, *or corruptly persuades* another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to" make evidence or testimony unavailable to an official proceeding. 18 U.S.C. § 1512(b) (2000) (emphasis added). Senator Biden explained that the italicized language was necessary because, under then-existing law, "promising to pay a witness for giving false

testimony is not a crime." 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988). He offered examples of "corrupt persuasion," which he said "include preparing false testimony for [a] witness, or offering a witness money in return for false testimony." *Id.* Nothing in the legislative history suggests that Congress intended to criminalize "persuasion" that did not involve conduct that is *malum in se*, such as bribery or urging a witness to lie.

2. At the time that Andersen engaged in the challenged conduct, therefore, destroying documents in anticipation of a judicial or agency proceeding that had not yet commenced was not criminal at all.[18] Until the 1988 amendments, the "witness tampering" prohibited by § 1512 prior to the start of formal proceedings encompassed only coercive or deceptive conduct; after those amendments it also prohibited non-coercive "persuasion" only if it was "corrupt" in nature. Consistent with that background law, virtually all companies of any size adopted document retention policies that permit or require the destruction of potentially harmful materials prior to the initiation of actual proceedings or the receipt of a subpoena. And citizens regularly engage in a range of other actions which, although specifically intended to impede the fact-finding ability of some future proceeding, are commonly understood to be lawful and appropriate.

The Fifth Circuit held in this case that the addition of "corruptly persuades" to § 1512 put the world on notice that it was, for the first time, a serious felony to try to *persuade* another person to engage in perfectly lawful conduct, if one object of that persuasion is to impede the government's future fact-finding. That holding utterly transforms the practical law of obstruction. It criminalizes, for example:

- a polite request by one corporate employee to another to comply with the firm's document

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[18] Such conduct could be prosecuted under 18 U.S.C. § 3 if the defendant knew a crime had been committed. In the wake of this case, Congress also enacted 18 U.S.C. § 1519, which for the first time made it a crime to destroy documents with the intent to impede a federal proceeding before any such proceeding is initiated.

retention policy by discarding documents when no proceeding is pending, even though either employee could lawfully discard those same documents;

- advice to a friend not to comply with a *voluntary* request from the SEC or FBI for documents;
- an employer's instruction that employees construe a document subpoena literally rather than broadly; or
- a mother's efforts to persuade her son to invoke his Fifth Amendment rights not to testify.

An interpretation of a criminal statute that confers such broad discretion on prosecutors to impose criminal sanctions without fair warning must be rejected, and other circuits have done just that.

B. The Fifth Circuit's Interpretation Of "Corruptly Persuades" Conflicts With The Law Of The Third And D.C. Circuits

The Fifth Circuit's erroneous interpretation of § 1512 deepens an existing, acknowledged split between the Third and D.C. Circuits and the Second and Eleventh Circuits.

1. In *Poindexter*, the D.C. Circuit reversed the defendant's conviction for "corruptly" obstructing a congressional inquiry by lying to Congress in connection with the Iran-Contra affair. The court held that "on its face, the word 'corruptly' [in § 1505] is vague" and that "in the absence of some narrowing gloss, people must 'guess at its meaning and differ as to its application.'" 951 F.2d at 378 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). The D.C. Circuit also held that words like "'improper' are no more specific—indeed they may be less specific—than 'corrupt.'" *Id.* at 379. After canvassing the historical interpretation of the term "corruptly" in the obstruction statutes, the D.C. Circuit concluded that § 1505 applied only to a person "who, for the purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty." *Id.* It then held that simply lying to Congress does not satisfy that standard.[19]

[19] Congress responded to *Poindexter* by amending 18 U.S.C. § 1515(b) to provide that "[a]s used in section 1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." That amendment reverses the narrow holding of *Poindexter* by making it clear that lying to Congress violates the statute. It could not, of course, alter the D.C. Circuit's constitutional analysis that "corrupt" must mean something more than "improper" to survive Due Process review. In any event, Congress expressly limited that definition to § 1505 which, unlike § 1512, requires knowledge of a pending official proceeding.

In *United States v. Morrison*, 98 F.3d 619, 630 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1131 (1997), a defendant charged with witness tampering by "corrupt[] persua[sion]" argued, citing *Poindexter*, that § 1512 would also be unconstitutionally vague unless "corruptly" were read to require improper means such as bribery. The D.C. Circuit agreed that "the two statutes are sufficiently similar to support [the same] interpretation of the word 'corruptly' in § 1512(b)." The court held that the defendant in *Morrison* nonetheless acted "corruptly," because he urged a witness to testify falsely under oath. The D.C. Circuit thus held that a conviction for "corruptly persua[ding]" under § 1512 requires proof that the persuader either used wrongful means like bribery, or urged another to violate the law.

2. The Third Circuit has also held that "corruptly" in § 1512 does not mean acting with "an improper purpose." In *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997), the defendant was caught selling adulterated meat and tried to persuade one of his coconspirators that they should "stick together." Farrell was convicted of "corruptly persuad[ing]" his coconspirator to withhold information, but the Third Circuit reversed the conviction. The court first held that "the phrase 'corruptly persuades' [is] ambiguous," and that it "cannot mean simply 'persuades with the intent to hinder communication to law enforcement' because such an interpretation would render the word 'corruptly' meaningless" and "[t]he Supreme Court has cautioned that courts should give meaning to all statutory terms, especially those that 'describe an element of a criminal offense.'" 126

F.3d at 487 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994)). The court also explicitly rejected the government's argument that "corruptly" means "motivated by an improper purpose." *Id.* at 489-90. It pointed out that "because the 'improper purposes' that justify the application of § 1512(b) are already expressly described in the statute, construing 'corruptly' to mean merely 'for an improper purpose' (including those described in the statute) renders the term surplusage." *Id.* at 490. The Third Circuit held that "corruptly" necessarily requires more culpability than the mere "intent to hinder an investigation." *Id.* at 489. The court also noted that even if that were not the most reasonable reading of the statute it was certainly permissible, and therefore required by the rule of lenity. *Id.*

After reviewing the legislative history of § 1512, the Third Circuit concluded, like the D.C. Circuit, that "both attempting to *bribe* someone to withhold information and attempting to *persuade* someone to provide *false information* ... constitute 'corrupt persuasion' punishable under § 1512(b)." *Id.* at 488. The court declined to resolve in *Farrell* whether some conduct outside those categories might be "corrupt," because it was certain that the statute *did not* cover the conduct with which Farrell was charged—"a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators." *Id.*

The Third Circuit returned to this issue in *United States v. Davis*, 183 F.3d 231 (3d Cir. 1999), and squarely held that a conviction secured through a jury instruction that defined "corruptly" as an "improper purpose" had to be reversed. In *Davis*, the defendant attempted to get his wife's ex-boyfriend, a mafia turncoat working with the FBI, killed by revealing the ex-boyfriend's status as an informer to his criminal associates. The district court instructed the jury that "[t]he word 'corruptly' means having improper motive or purpose of obstructing justice." *Id.* at 250 n.6. Citing

Farrell and *Poindexter*, the Third Circuit held that an "improper purpose," is "insufficient ... to justify a conviction" under § 1512. *Id.* at 250. The court held that the defendant could perhaps be convicted under § 1512 on remand because he may have urged another to violate the law (by killing his wife's ex-boyfriend), but instructed the district court to "clarify [to the jury] that 'corrupt persuasion' involves more than an improper motive, and includes inducements to violence." *Id.* at 250 & n.6.[20]

3. The Fifth Circuit offered no persuasive reason to reject the interpretation of "corruptly persuade" adopted by the Third and D.C. Circuits. *First*, the plain meaning of the term "corrupt" is "'depraved, evil: perverted into a state of moral weakness or wickedness ...; characterized by bribery, the selling of political favors, or other improper political or legal transactions.'" *Poindexter*, 951 F.2d at 378 (citation omitted). The legislative history of § 1512 and the other obstruction statutes suggests that at least the core meaning of "corrupt" is "actions that 'corrupted' another person," *i.e.*, that induced them to commit violations of the law. *Id.* at 380, 385; 134 Cong. Rec. S17,369 (explaining that it was necessary to add "corruptly persuades" to ensure that "the corruption of a witness" could be prosecuted). Regardless, the term clearly requires some conduct that is *malum in se*.

The *Poindexter/Farrell* interpretation guarantees that a defendant could not be convicted under § 1512 without the "depraved," "evil," or "wicked" state of mind fairly required by the plain meaning of "corruptly." The instruction approved by the Fifth Circuit here does not. Interpreting another statute that required a "corrupt[] endeavor," this

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[20] *Davis* explained that equating "corruptly" with an "improper purpose" would mean that "a lawyer's instruction to a client not to speak to potential government witnesses, including government investigators, would ... constitute witness tampering," except that § 1515(c) creates a defense for lawyers. "A defendant's husband or mother ... would not fall within this safe harbor if he or she advised a defendant to keep silent when approached by potential witnesses." 183 F.3d at 248. The Court thought it obvious Congress did not intend to criminalize such conduct.

Court held in *Aguilar* that a defendant's "culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability" even though he lied to the FBI with the specific "intent to 'obstruct ... the due administration of justice.'" 515 U.S. at 602.

Second, the Fifth Circuit's reading renders the overall scheme of the federal obstruction statutes as written in 2001 positively nonsensical. Section 1512 covered certain acts that cause *others* to destroy evidence, but not a defendant's own destruction of evidence. Because the statutes covering a defendant's *own* conduct applied only when a proceeding was pending, the upshot of the Fifth Circuit's holding is that in October 2001 David Duncan was free to throw his own documents in the trash; his secretary was free to throw those same documents in the trash; but it was suddenly a serious felony for Mr. Duncan to *ask* his secretary to throw a document in the trash. Congress surely could not have intended such a surprising interpretation.

Third, the Fifth Circuit's interpretation of "corruptly" also renders that term superfluous. Section 1512 has a separate specific intent element that already requires proof that the defendant knowingly intended to make evidence unavailable for use in an official proceeding. Yet the instructions approved by the Fifth Circuit equated "corruptly" with an "intent to impede the fact-finding ability of an official proceeding." The Fifth Circuit asserts that that somehow "implies a degree of personal culpability beyond a mere intent to make documents unavailable," but never explains how or offers a single example. As *Farrell* correctly recognized, to deprive a proceeding of evidence is, self-evidently, to interfere with its fact-finding ability.[21]

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[21] "Judges should hesitate to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Bailey v. United States*, 516 U.S. 137, 145 (1995); *see also TRW, Inc. v. Andrews*, 534 U.S. 19, 29-31 (2001) (rejecting statutory interpretation on surplusage grounds, even though section might still serve an "independent function" in "rare and egregious

And the Fifth Circuit concedes in this case that "defining 'corruptly' in terms of improper purpose" casts only "dim light ... upon its meaning," even leaving "its circularity aside." Pet. App. 19a. Thus, as *Farrell* emphasized, the rule of lenity "demand[s] resolution of ambiguities in criminal statutes in favor of the defendant." *Hughey v. United States*, 495 U.S. 411, 422 (1990).

Fourth, the legislative history here in no way trumps the rule of lenity. The Fifth Circuit largely rests its interpretation on Senator Biden's comment that "corruptly persuades" was added "to include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503." 134 Cong. Rec. S17,369. The Court echoes an assertion of the dissenting judge in *Farrell* that "Congress knew that courts had uniformly defined 'corruptly' in § 1503 as 'motivated by an improper purpose.'" Pet. App. 23a. But as the D.C. Circuit's scholarly overview in *Poindexter* makes clear, that characterization is simply incorrect: "Courts construing § 1503 have adopted a wide variety of interpretations" of the word "corruptly." 951 F.2d at 385. Indeed, the Fifth Circuit's own pattern jury instruction defines "corruptly" for § 1503 as "knowingly and dishonestly"—not an "improper purpose."[22] "Improper purpose" instructions have certainly been given in § 1503 cases, but the pending proceeding requirement makes it far less likely that a vague instruction will permit conviction without fair warning, and there was certainly no consensus that an "improper purpose" standing alone was sufficient for criminality in circumstances like those presented here.[23]

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case[s]," because canon of construction precludes interpretations that render sections of a statute "insignificant, if not wholly superfluous").

[22] Fifth Circuit Pattern Jury Instructions (Criminal Cases), Instruction No. 2.65, at 175 (2001), *available at* http://www.lb5.uscourts.gov/juryinstructions/crim2001.pdf.

[23] Every decision mentioned by Senator Biden in the legislative history, whether prosecuted under § 1503 or the pre-amendment § 1512(b), involved independently wrongful efforts to influence witnesses. *See United States v. King*, 762 F.2d 232, 237 (2d Cir. 1985) (bribery of

When Senator Biden's comments on the 1988 amendment are read as a whole, it is clear that the point was to ensure that defendants could be prosecuted for bribing witnesses and procuring false testimony—not for politely persuading them to engage in lawful conduct. *See supra* at 16-17.

4. If the Fifth Circuit had adopted the Third or D.C. Circuits' interpretation of § 1512, Andersen could not have been convicted. There is no evidence that the supposed "corrupt persuaders" in this case used bribery or any other improper means, or that they attempted to persuade anyone to do anything unlawful. The Fifth Circuit's opinion appears to begin a form of harmless error analysis by writing that "[o]n the facts of this case, that the jury was not required to find a violation of an independent legal duty did not have a substantial and injurious effect on the verdict." Pet. App. 24a-25a. But the Court actually supplies no analysis of the facts, instead reiterating its conclusion that the instructions given were correct and gave an adequate independent meaning to "corruptly." As set forth *supra* at 9 & 10 n.15, Andersen could not have been convicted under this interpretation of § 1512 and the Government *never* argued that this error could possibly be harmless on this record.[24]

Although the Fifth Circuit reads *Farrell* to stop short of fully adopting the D.C. Circuit's *Poindexter* test (Pet. App.

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witness), *cert. denied*, 475 U.S. 1018 (1986); *United States v. Vesich*, 724 F.2d 451, 453-58 (5th Cir. 1984) (persuade witness to testify falsely); *United States v. Gates*, 616 F.2d 1103, 1107 (9th Cir. 1980) (same); *United States v. Risken*, 788 F.2d 1361, 1367 (8th Cir.) (attempt to have one witness killed and to mislead another), *cert. denied*, 479 U.S. 923 (1986); *United States v. Lester*, 749 F.2d 1288, 1295 (9th Cir. 1984) (hiding a witness under an obligation to testify); *United States v. Hernandez*, 730 F.2d 895, 898 (2d Cir. 1984) (threat to kill a witness).

[24] The use of jury instructions that misinterpreted the elements of a criminal offense requires reversal unless the error is harmless beyond a reasonable doubt—a standard that could not be satisfied here. *See, e.g., Neder v. United States*, 527 U.S. 1, 10 (1999) (finding that a conviction must be reversed when an instruction involves either "misdescriptions" or "omissions" of an element of the offense unless the error is harmless beyond a reasonable doubt); *United States v. Walls*, 225 F.3d 858, 867 (7th Cir. 2000) (same).

20a-21a), we do not believe that is a fair reading of Third Circuit law after *Davis*.[25] Regardless, both *Farrell* and *Davis* make it crystal clear that the instructions given in this case—defining "corruptly" as an "improper motive" and an intent to "impede the fact-finding ability of an official proceeding"—are improper. *Farrell* and *Davis* squarely hold that an "improper motive" or an "'intent ... to hinder an investigation'" are insufficient for conviction. *See Davis*, 183 F.3d at 250 & n.6 (quoting *Farrell*, 126 F.3d at 489). That conclusion is also plainly required by this Court's opinion in *Aguilar*, which held that "an intent to 'obstruct ... the due administration of justice,'" is not alone sufficiently wrongful to give fair warning of criminality. 515 U.S. at 602.

As the Fifth Circuit notes, Pet. App. 19a n.17, the Second and Eleventh Circuits have expressly rejected the *Farrell/Poindexter* interpretation of § 1512 and have held that something like an "improper purpose" is sufficient. *See United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999); *United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996); *see also United States v. Khatami*, 280 F.3d 907 (9th Cir.) (acknowledging conflict), *cert. denied*, 535 U.S. 1068 (2002). The Fifth Circuit's opinion in this case therefore deepens an existing, acknowledged circuit split. It bears mention, however, that the Eleventh Circuit instruction requires that the defendant act "knowingly *and dishonestly* with the specific intent to subvert or undermine the integrity or truth-seeking ability of an investigation." *Shotts*, 145 F.3d at 1301 (emphasis added). Andersen requested a similar "acting dishonestly" instruction in this

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[25] In *United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999), the Third Circuit affirmed the § 1512 convictions of defendants who hired someone to paint over a blood-spattered wall. The defendants apparently did not argue that their conduct was not "corrupt," and the panel gave no indication that it was reconsidering *Farrell* or *Davis*. In any event, the defendants in *Applewhaite* knew that a crime had been committed and were therefore soliciting conduct that would have been unlawful for them to engage in. *See supra* at 9 n.13. Andersen had no such knowledge. *See supra* at 9.

case, because the jury certainly could have concluded that there is nothing "dishonest" about openly reminding fellow employees to comply with a lawful document retention policy. The district court refused. Tr. 4316-19. Andersen accordingly could have prevailed under Eleventh Circuit law as well.

C. The Fifth Circuit's Refusal To Require Proof Of Conscious Wrongdoing And A Close Nexus To A Particular Proceeding Criminalizes Conduct Without Fair Warning And Conflicts With The Law Of The First Circuit

The spare phrase "corruptly persuades" is plainly insufficient to place a person of common intelligence on notice that the conduct prosecuted here—politely asking another person to do something that either of you could lawfully do independently—is a crime. As *Aguilar* instructs, the doctrine of constitutional doubt requires that *some element* of § 1512 must be narrowed to ensure that no one is convicted without fair warning. The *Farrell/Poindexter* interpretation of "corruptly persuades" cures that difficulty, but the statute should be narrowed in other ways. The First Circuit has required proof of conscious wrongdoing and a close nexus to a particular official proceeding, but the Fifth Circuit rejected those limitations.

1. The Fifth Circuit's refusal to read "corruptly persuades" to at least require proof of conscious wrongdoing cannot be reconciled with this Court's decision in *Ratzlaf* and *Bryan v. United States*, 524 U.S. 184 (1998). Andersen proposed that the defendant must have some consciousness that its conduct was "wrongful" and the plain meaning of "corruptly" surely requires at least that. The Fifth Circuit disagreed on the ground that ignorance of the law is no defense. In *Bryan*, however, this Court stressed that requiring such basic consciousness of wrongdoing "does not carve out an exception to the traditional rule that ignorance of the law is no excuse." 524 U.S. at 196.

In addition, the usual presumption against "ignorance of the law" defenses assumes that criminal statutes are not interpreted so broadly that a person could be convicted in the absence of some fair warning—from the conduct, surrounding context, or plain language of the statute—that the line into criminal behavior was being crossed. In *Ratzlaf*, this Court interpreted "willfully" in the anti-structuring statutes to require actual knowledge of the law because that statute criminalized conduct that was not "obviously 'evil'" or "inevitably nefarious." 510 U.S. at 144-46.[26] That conduct—"structur[ing] cash transactions 'for the specific purpose of depriving the Government of the information that [the currency reporting statute] is designed to obtain,'" is if anything more obviously culpable than the conduct criminalized in this case. *Id.* at 144 (citation omitted). And this Court has already held that an intent to obstruct justice is not in itself obviously wrongful. *Aguilar*, 515 U.S. at 602. If § 1512 is to be interpreted in a manner that creates the same problem as in *Ratzlaf*, then Andersen was entitled to an instruction requiring (at least) some consciousness of wrongdoing. Consistent with this guidance, the First Circuit held in *United States v. Frankhauser*, 80 F.3d 641, 652 (1996), that there was sufficient evidence of "corrupt intent" in a § 1512 case because a "prior conviction for [obstruction] by advising the destruction of documents gave [the defendant] notice that his advice ... was illegal."

2. The official proceeding instructions also impermissibly broadened the statute in two basic respects.

First, Andersen objected to the lack of any "nexus" element in the instructions that would require some

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[26] *Ratzlaf* is not limited to statutes containing the *mens rea* term "willfully." This Court recognized that "willfully" is a "'word of many meanings,'" *Ratzlaf*, 510 U.S. at 141 (citation omitted), and grounded its holding on the fact that the statute would otherwise criminalize conduct that a reasonable person could believe to be lawful. This Court held that "knowingly" required knowledge of illegality in *Liparota v. United States*, 471 U.S. 419 (1985), for similar reasons. If anything, the word "corruptly" connotes a greater consciousness of wrongdoing than "willfully" does.

meaningful connection between Andersen's conduct and some concretely expected official proceeding. As set forth, much of the fair warning in the traditional obstruction statutes has been supplied by the context of a pending judicial proceeding. And *Aguilar* suggests that, in this context, knowledge that a proceeding is at least "likely" or "probable" is required for criminality. 515 U.S. at 599-600. Four circuits have squarely addressed the issue of how "concrete[] ... the defendant's expectation of a proceeding" must be to sustain a conviction under § 1512. Pet. App. 26a. Two have sided with the decision below and declined to extend this Court's reasoning in *Aguilar* to § 1512.[27] The First Circuit, however, has held that even though § 1512 provides that the proceeding need not actually be pending, it nonetheless requires at least some "intent to impair an object's availability for use in a *particular* official proceeding" and should not be read to permit conviction based on proof that the defendant "may have foreseen an official proceeding at some time in the future." *Frankhauser*, 80 F.3d at 651-52. The First Circuit instead upheld a § 1512(b) conviction because there was "direct evidence that [the defendant] *in fact expected* a grand jury investigation and/or a trial in the foreseeable future." *Id.* (emphasis added).

The Fifth Circuit nevertheless upheld an instruction in this case that required no nexus. R. 1253. The Court recognized that its prior precedent in *Shively* described the required nexus as proof of an intent to affect a "particular," "ongoing," or "scheduled" proceeding, 927 F.2d at 812-13; that Andersen's overall nexus argument was "not without force"; and that the lack of a nexus requirement could potentially permit convictions for "maintaining records

[27] *See United States v. Gabriel*, 125 F.3d 89, 104-05 (2d Cir. 1997) (refusing to extend *Aguilar* to § 1512, holding instead that the government need only prove "intent to interfere with ... potential" testimony in official proceedings); *United States v. Kelley*, 36 F.3d 1118, 1128 (D.C. Cir. 1994) (holding that § 1512 only requires that the defendant "fear[] that a ... proceeding had been or might be instituted").

retention programs which were adopted with no proceeding in mind." Pet. App. 27a.[28] It nevertheless read the statute to foreclose any required proof of nexus because § 1512(e)(1) provides that the proceeding "need not be pending or about to be instituted at the time of the offense."

That error was not harmless. Although the Court found that "the SEC was the feared opponent," it *did not* conclude that the record compelled the conclusion that Andersen "'knew that the SEC was coming.'" Pet. App. 28a (citation omitted). Nor could it have. As explained *supra*, Andersen employees did not believe an income restatement (and thus a formal SEC investigation) was "likely" until *after* all of the alleged acts of corrupt persuasion occurred. The jury that declared itself deadlocked surely might have acquitted if it had been instructed that the official proceeding must be "scheduled," or "particular," or "expected," or "likely," or any other formulation capturing the basic notion that a concern about possible future proceedings is not enough. *See supra* at 4-9.[29]

Second, the instructions wrongly told the jury that an official proceeding included informal SEC investigations. Pet. App. 25a n.32. As a consequence, the jury was

[28] Andersen sought to require a meaningful "nexus" between its conduct and some concretely contemplated official proceeding by requesting an instruction in reliance on *Shively* that the proceeding must be at least "ongoing or scheduled." R. 426. Andersen also maintained that the jury should at least be given an instruction that it could convict only if Andersen intended to impede "a *particular* [official] proceeding." R. 1122-23; Tr. 4339-42. Even if neither of those formulations precisely tracks the interpretation ultimately adopted by this Court, Andersen clearly preserved its objection on this issue. *See United States v. Jones*, 909 F.2d 533 (D.C. Cir. 1990) (R. Ginsburg, J.) (instruction describing element of criminal offense requires reversal unless harmless beyond a reasonable doubt, even though instruction proffered by defendant was also incorrect).

[29] In addition, the instructions allowed the jury to convict Andersen merely for having a document retention policy. The prosecution forwarded that theory explicitly by arguing that a videotape which did not relate to Enron was "corrupt[] persua[sion]," and the jury asked to see that tape during their deliberations. Pet. App. 27a.

instructed that an "official proceeding" *was already pending* during the relevant period. Andersen argued that was incorrect as a matter of law, and that no "official proceeding" began until the SEC opened a formal investigation on October 30.[30] The Fifth Circuit's analysis suggests that it agreed, but never addressed the significance of the error. Yet that error transformed the case. The government obviously did not believe that was true, or it would have charged Andersen with a violation of § 1505 rather than this convoluted witness tampering theory. But having obtained the incorrect instruction, the government played it to the hilt—beginning its closing by telling the jury that "an official proceeding includes both an informal and formal inquiry of the SEC" and that there was no dispute "that there was an SEC proceeding ongoing at the time the document destruction occurred." Tr. 6352. Because that error entirely removed the nexus issue from the jury, and because the jury might have concluded that Andersen's conduct was "corrupt" only because a proceeding was pending, it cannot have been harmless.

The instructions upheld by the Fifth Circuit in this case accordingly conflict with decisions of this Court and other Circuits in several fundamental respects. In combination, they read § 1512(b) to permit convictions for speech that a reasonable person would not understand to be unlawful. And the extraordinary harm caused by this wrongful prosecution starkly demonstrates the need for this Court to resolve these recurring issues of central importance to the fair administration of the obstruction laws.

CONCLUSION

The petition for certiorari should be granted, and the conviction should be reversed.

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[30] Courts have held that preliminary inquiries by agency staff, which are not authorized by a formal vote and do not have subpoena power, are not official proceedings. *See Kelley*, 36 F.3d at 1127; *see also United States v. Senffner*, 280 F.3d 755, 761 (7th Cir.), *cert. denied*, 536 U.S. 934 (2002). Such inquiries also do not meet the definition of a "proceeding" under the SEC's own regulations. *See* 17 C.F.R. § 201.101(a)(9).

Respectfully submitted,

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APPENDIX

[United States Court of Appeals]
[Fifth Circuit]
[FILED]
[June 16, 2004]
[Charles R. Fulbruge III]
[Clerk]

REVISED June 24, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-21200

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTHUR ANDERSEN, LLP,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Before REAVLEY, HIGGINBOTHAM, and BENAVIDES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Today we decide one of the many cases arising from the rubble of Enron Corporation, which fell from its lofty corporate perch in 2001 wreaking financial ruin upon thousands of investors, creditors, and employees. Like a falling giant redwood, it took down with it many members of

its supporting cast. Our present focus is upon one of those, Arthur Andersen, LLP, then one of the largest accounting and consulting firms in the world.

Arthur Andersen appeals from a judgment of conviction entered in the Southern District of Texas upon a jury verdict finding it guilty of obstructing an official proceeding of the Securities and Exchange Commission, in violation of 18 U.S.C. § 1512(b)(2). The indictment leading to the conviction was returned on March 7, 2002, charging Andersen in a single count of corruptly persuading one or more Andersen personnel to withhold, alter, destroy, or conceal documents with the intent to impair their availability in an official proceeding. That proceeding, which the government said Andersen knew was imminent and inevitable, was an investigation by the SEC into the relationship between Enron and Andersen, from whom Enron obtained accounting, auditing, and consulting services.

Trial commenced on May 6, 2002, and the verdict was returned on June 15, 2002. Writ large, the government says that Andersen, in an effort to protect itself and its largest single account, ordered a mass destruction of documents to keep them from the hands of the SEC.

Andersen asks this court to reverse its conviction, urging errors in four evidentiary rulings, misconduct by the prosecutor in his rebuttal jury summation, and two legal contentions regarding the required proof under § 1512(b)(2). The evidentiary rulings include admitting extensive evidence regarding two unrelated SEC enforcement actions against Andersen, excluding evidence of the volume of documents Andersen did not destroy, and excluding impeachment evidence. Regarding the proof required by § 1512(b)(2), Andersen urges that given its element of "corruption," the government had to prove more than that it acted with an intent to impede the SEC. Finally, Andersen asserts that the government had to prove that Andersen intended to interfere with a "particular" proceeding.

We are not persuaded that this conviction is flawed by reversible error and we affirm the judgment of conviction.

I

During the 1990's, Enron transformed itself from a natural gas pipeline operator into a trading and investment conglomerate with a large volume of trading in the energy business. Andersen both audited Enron's publicly filed financial statements and provided internal audit and consulting services. By the late 1990's, Andersen's "engagement team" for its Enron account included more than 100 people, a significant number of which worked exclusively in Enron quarters in Houston, Texas. From 1997 through 2001 the engagement team's leader was David Duncan. He was in turn subject to certain managing partners and accounting experts in Andersen's Chicago office. Enron was a valued client producing 58 million dollars in revenue in 2000 for Andersen with projections of 100 million for the next year. Enron's Chief Accounting Officer and Treasurer throughout this period came to the employ of Enron from the accounting staffs of Andersen, as did dozens of others. This was a close relationship. Indeed, the jury heard evidence that Andersen removed at Enron's request at least one accountant from his assignment with Enron after Enron disagreed with his accounting advice.

With Enron's move to energy trading and rapid growth came aggressive accounting, pushing Generally Accepted Accounting Principles to its advantage. Part of this picture included Enron's use of "special purpose entities," SPEs. These were "surrogate" companies whose purpose was to engage in business activity with no obligation to account for the activity on Enron's balance sheet. Four of these SPEs—called Raptors—play a large role in this story. They were created in 1999 and 2001, with the assistance of Andersen, largely capitalized with Enron stock. The Raptors engaged in transactions with "LJM," an entity run by Andrew Fastow, Enron's Chief Financial Officer. By late 2000 and early 2001, the traded price of Enron's stock was dropping

and some of the Raptor's investments were also turning downward. Some of the SPEs were profitable and some were experiencing sharp losses. But aggregated they reflected a positive return to Enron. GAAP would not permit such an aggregation of the four entities and Andersen's Chicago office told David Duncan that it would not—that it was a "black and white" violation. That advice was ignored and the losses were buried under the profits of the group in the public reporting for the first quarter 2001. The slide of Enron stock continued, dropping some 50% from January to August 2001.

The summer of 2001 brought problems to Andersen on other fronts, and these "unrelated" events later become important to the issues before us. In June 2001 Andersen settled a dispute with the SEC regarding Andersen's accounting and auditing work for Waste Management Corporation. Andersen was required to pay some $7 million, the largest monetary settlement ever exacted by the SEC, and Andersen suffered censure under SEC Rule 102(e). Then in July 2001, the SEC sued five officers of Sunbeam Corporation and the lead Andersen partner on its audit.

Meanwhile, events at Enron began to accelerate. On August 14, 2001, Jeffrey Skilling, Enron's CEO, resigned, pushing Enron stock further downward. Within days, Sherron Watkins, a senior accountant at Enron, formerly at Andersen, warned Enron's Chairman, Kenneth Lay, that Enron "could implode in a wave of accounting scandals." She also warned David Duncan and Michael Odom, an Andersen partner in Houston who had oversight responsibility for Duncan. Chairman Lay promptly asked Enron's principal outside legal counsel to examine the accused transactions. And by early September, senior Andersen officials and members of its legal department formed a "crisis-response" group, including, among others, its top risk manager and Nancy Temple, an in-house lawyer in Chicago assigned to Enron matters on September 28, 2001.

Possible proceedings became a reality on November 8, 2001, when Andersen received an SEC subpoena. The time line between September 28 and November 8, from a possibility of proceeding to fact, is important and we turn briefly to that narrative.[1]

On October 8, Andersen contacted a litigation partner at Davis, Polk and Wardwell in New York regarding representation of Andersen. The following day, Nancy Temple discussed the problem of Enron with senior in-house counsel at Andersen. Her notes from this meeting refer to an SEC investigation as "highly probable" and to a "reasonable possibility" of a restatement of earnings. Her notes also recorded, "without PSG agreement, restatement and probability of charge of violating cease and desist in Waste Management." Two days later, on October 10, Michael Odom urged Andersen personnel to comply with the document retention policy, noting "if it's destroyed in the course of normal policy and litigation is filed the next day, that's great ... we've followed our own policy and whatever there was that might have been of interest to somebody is gone and irretrievable."

On October 12, Temple entered the Enron crisis into Andersen's internal tracking system for legal matters, labeling it "government regulatory investigation," and asked Odom if the engagement team was in compliance with Andersen's document policy. Odom forwarded the email to Duncan in Houston.

Meanwhile, Enron was facing an October 16 date for announcing its third quarter results. That release had to disclose a $1.01 billion charge to earnings and, to correct an accounting error, a $1.2 billion reduction in shareholder equity. Enron's draft of the proposed release described the charge to earnings as "non-recurring." Andersen's Chicago personnel advised that this phrase was misleading, but Enron did not change it. With one exception, Andersen took

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[1] The indictment alleged that the acts of obstruction took place between October 16 and November 9, 2001.

no action when its advice was not followed: Temple suggested that Andersen's characterization of the draft release as misleading be deleted from the email exchanges.

An SEC letter to Enron quickly followed the releases of October 16. In the letter the SEC advised that it had opened an informal investigation in August and an additional accounting letter would follow. Andersen received a copy of the letter on Friday, October 19. A Saturday morning conference of Andersen's Enron crisis group followed. While the meeting traversed a range of issues, Temple again reminded all "to make sure to follow the policy." The following Tuesday, October 23, Enron had a telephone conference with security analysts. At the same time, Duncan scheduled an "urgent" and "mandatory" meeting in Houston at which, following lengthy discussion of technical accounting issues, he directed the engagement team to comply with Andersen's records retention policy.

On October 26, a senior partner at Andersen circulated an article from the *New York Times* discussing the SEC's response to Enron. In an email, he commented that "the problems are just beginning and we will be in the cross-hairs. The marketplace is going to keep the pressure on this and it's going to force the SEC to be tough." Evidence that this prediction of SEC toughness was sound came quickly. On October 30, the SEC sent Enron a second letter requesting accounting documents—a letter signed by the two top enforcement division officials.

Throughout this period Andersen's Houston office shredded documents. Government witnesses detailed the steady shredding and deletion of documents and the quantity of paper trucked away from the Houston office. Almost two tons of paper were shipped to Andersen's main office in Houston for shredding. The government produced an exhibit at trial charting the time and quantity of the carted waste paper from January 2001 through December of that year. The pounds carted remained fairly steady at a rate under 500 pounds, but spiked on October 25 to just under 2500 pounds. The shredding continued until the SEC

served its subpoena for records on November 8. Temple advised Duncan that the subpoenae had been served. The next day Duncan's assistant advised the Houston team: "Per DAVE—No more shredding. ... We have been officially served for our documents."

Enron filed for bankruptcy on December 2, 2001. The following April, David Duncan pleaded guilty to obstructing the SEC.

II

We turn first to Andersen's claims of error in certain evidentiary rulings at trial.

1

The first such contention urges error in the district court's exclusion of Andersen's evidence of the volume of documents retained by the engagement team that were either not deleted or recaptured and produced to the SEC. This evidence was relevant, Andersen argues, because it is inconsistent with the charge that its personnel were "corruptly persuaded" to destroy documents and delete emails to keep them from the SEC. Andersen's explanation for the shredding and deleting, at least for the upward spike on October 23, was that personnel in its Houston office were attempting to clean up their files in anticipation of their examination by Chicago supervising personnel, and that the presence of multiple copies of significant documents was evidence that there was "no systematic attempt to root out embarrassing materials." The argument continues that the district court misunderstood the issue. Pointing to an in limine order, Andersen argues that Judge Harmon believed the proffered evidence inadmissible as an attempt to offer evidence that "on other occasions the defendant acted innocently," when the true thrust of the evidence was to negate the evidence that any person acting for Andersen acted corruptly and with the intent necessary to commit the charged crime.

The government replies that refusing to admit the documents into evidence was simply the court's enforcement of its pretrial ruling on discovery—that the defendant could not offer documents in trial that it had not produced for examination by the prosecution before trial; that Andersen never authenticated the documents nor by a proper predicate demonstrated that the documents not destroyed, to which it wanted to point, were relevant Enron documents. Relatedly, the government notes that other evidence was before the jury demonstrating that not all of the documents were destroyed. Finally, it argues that the evidence supporting Andersen's conviction is so powerful, that any error was not reversible error.

The government relied on the volume of documents destroyed as evidence of Andersen's intent. It follows that competent evidence countering the government's proof of the volume of shredding, as well as its timing, undeniably had some relevance. To put the issue in perspective, Andersen did not attempt to deny that it shredded large numbers of documents and for sustained periods, leaving the government's assertion to this extent largely unchallenged. Nor does Andersen's principal argument claim error in the exclusion of specific documents alleged to have been destroyed. In sum, that all documents were not destroyed and that large numbers of documents were produced to the SEC by Andersen was not challenged.[2] Some 21 boxes of Duncan's preserved desk files were introduced by Andersen and displayed to the jury. Andersen's explanation for the undeniable surge in shredding and the persistent and uncustomary reminders to employees to abide Andersen's retention policy was that it wanted to leave only the work papers of auditing efforts, and that Duncan did not want his

[2] There was a misstatement by a prosecutor regarding an email he represented to the jury was deleted and not produced by Andersen. That was corrected on the objection of the defense. We describe this event later in Part IV while addressing Andersen's claim of prosecutorial misconduct.

superiors in Chicago to face his unkempt files. That explanation pointed to the upsurge in papers trucked away shortly after he learned of his superior's planned visit to Houston. The jury was free to evaluate this testimony.

Andersen maintained at trial that it was not offering the specific documents into evidence and hence its proffer of documents not identified to the prosecution as trial exhibits before trial did not violate the pretrial order entered by the trial judge; that it wanted to place into perspective the government's evidence of the amount of paper carted away by proof of the large amount of documents produced for the SEC. The government responded at trial that the evidence would not be relevant without the predicate proof of what the documents were and that proof, if forthcoming, would put the proffer in the teeth of the pretrial preclusion order. Fine point it is, but we cannot conclude that the trial judge abused her discretion in this ruling.

Regardless, even if there was a sufficient showing that these documents were relevant to the SEC proceeding, it is clear that Andersen was denied only this particular method of demonstrating that it produced a large number of documents; that it otherwise made this showing at trial is not seriously challenged. The district court observed that there was "ample evidence already in the record that all the documents were not destroyed" and that "Andersen does not need to introduce evidence of 1660 boxes of remaining desk files to make this point." Any error was not reversible error.

In sum, we are not persuaded that the district court committed reversible error in its rulings regarding the evidence of the volume of documents destroyed or retained.

2

We turn next to Anderser's contention that the district court erred in allowing the government to offer evidence of two SEC proceedings filed against it arising out of Andersen's work with Sunbeam Corp and Waste Management, Inc. Andersen argues that the evidence of

these charges of its misconduct and their settlement was not relevant in that there was no evidence that they were connected to any "corrupt persuader," or that any partner at Andersen involved in work at Sunbeam or Waste Management was also involved with its Enron account. It concedes that while the fact of these two difficulties with the SEC offers at least "a small kernel" of relevant evidence that "could have been thought relevant," far too much detail of the unproved accusations and settlements were admitted. This excess was such that the jury could not be expected to cabin its consideration to Andersen's motive in shredding documents. Rather, the argument goes, the government was allowed to prove that Andersen was "a bad corporate actor and should be found guilty for that reason alone."

Rule 404(b) is a rule of inclusion allowing proof of prior bad acts of a defendant when the acts are relevant to an issue other than the defendant's character, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[3] When the relevance of an issue is shown, the inquiry turns to Rule 403, which requires the exclusion of the evidence if its relevance is substantially outweighed by the danger of unfair prejudice.[4] There must be a "genuine risk that the emotions of the jury will be excited to irrational behavior," and the risk must be "disproportionate to the probative value of the offered evidence."[5] We will reverse only on a clear showing of a prejudicial abuse of discretion.[6]

The government opened its case with the testimony of Thomas Newkirk, one of four associate directors in the Division of Enforcement of the SEC. He explained (1) the structure of the Agency; (2) the difference between a matter

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[3] FED. R. EVID. 404(b).

[4] FED. R. EVID. 403.

[5] *United States v. Beechum*, 582 F.2d 898, 915 n.20 (5th Cir. 1978) (quoting Trautman, *Logical or Legal Relevancy A Conflict in Theory*, 5 VAND. L. REV. 385, 410 (1952)).

[6] *United States. v. Davis*, 546 F.2d 583, 592 (5th Cir. 1977).

under investigation or MUI and a formal inquiry; (3) that a 102(e) proceeding is directed at professionals engaged in misconduct in their practice before the commission, such as lawyers or accountants; and (4) that this proceeding could result in both a prohibition of practice before the SEC and censure for unprofessional conduct. He also explained that "almost without fail" a restatement of earnings by a Fortune 500 company will prompt a formal investigation and that documents for the investigation are obtained by subpoena.

Newkirk's attention was then drawn to prior proceedings by the SEC against Andersen. He explained to the jury that Sunbeam was a public company whose stock was traded on the New York Stock Exchange in the 1990's. Andersen was its auditor when in November 1998 Sunbeam filed a restatement of its earnings, reducing its earnings for two previous quarters by $60 million, nearly 30 percent of its earnings for that period. Under his supervision, the SEC on May 12, 1998, launched an investigation into Sunbeam's financial statements. He explained the course of the investigation, including Andersen's production of documents under an SEC subpoena and the filing of a complaint in the United States District Court in Florida. The complaint, also admitted into evidence, charged five officers from Sunbeam and the Andersen engagement partner with fraud. An amended complaint was filed on July 11, 2001.[7]

Newkirk then outlined the SEC action taken against Andersen and Waste Management. As he explained it, Waste Management, a Fortune 500 Company whose stock was traded on the New York Stock Exchange, filed a restatement of earnings for the years 1992 through the first three quarters of 1997 of more than $1.7 billion, the largest restatement in history, prompting a formal investigation. There had been an informal investigation, but on the filing of the formal investigation, the SEC promptly issued a

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[7] At this juncture Judge Harmon instructed the jury that these documents were only evidence of the SEC's statements, not the truth of the statements.

subpoena for Andersen documents. Then on June 19, 2001, the SEC filed a complaint in the Federal District Court in Washington, D.C. Andersen consented to a decree enjoining it from future violations of the Securities Laws. The Federal Court also imposed a fine of $7 million against Andersen and fines of from 30 to 50 thousand dollars against three Andersen partners sued in that case. This was the largest fine against a Big Five firm sought and obtained by the SEC. Finally, the government offered through Newkirk the censure of Andersen for issuing false and misleading statements that its audit of Waste Management had been conducted in accordance with generally accepted accounting principles.

Andersen's contention that the evidence of its difficulties with the SEC in the Sunbeam and Waste Management cases was not relevant is not persuasive. The district court carefully examined this question in a written ruling before trial to which she adhered in trial.

The defense of Andersen faced three large realities. First, David Duncan, its partner in charge of the Enron account, pleaded guilty to a criminal charge of obstruction, confessing intent to impede the SEC investigation by shredding documents. Second, it could hardly deny that Andersen engaged in massive shredding and deletion of files as a part of senior management's investigation of its handling of Enron, including difficulties with the accuracy of Enron's financial statement. Third, it must have known that a restatement of earnings of any appreciable size by a Fortunate 500 company would prompt a formal SEC investigation and subpoena for its documents. A contrary contention was a hard sell, at best.

As for Duncan, Andersen's able trial counsel suggested in his cross examination that Duncan was innocent, despite his plea of guilty. The large shredding was said to be an effort to catch up with the cleaning of files that had been put aside, contrary to Andersen's records retention policy and to get the files in order for review by Andersen's Chicago-

based supervisors. It was not to frustrate an SEC investigation.

Under the court's charge, the government had the burden of proving that the shredding was done with the intent to subvert, undermine, or impede an official proceeding, including proceedings before the SEC. In confronting that burden, the government urged that Andersen's difficulty with the SEC in other matters was the backdrop to Andersen's destruction of documents in its internal investigation of its work for Enron. Specifically, the government noted that the trouble at Enron came within months of Andersen being hit in the Waste Management case with the largest fine ever imposed by the SEC upon a Big Five accounting firm, accompanied by censure and a consent to an injunction not to mislead in violation of the securities laws, and that this blow was quickly followed by the filing of an amended complaint in the SEC's Sunbeam suit which leveled charges of fraud against Sunbeam officials and the Andersen partner in charge of that account. This backdrop, with its attendant press, includes the quickly following sudden resignation of Skilling, Enron's CEO, in August 2001. That is, trouble with Enron, Andersen's largest account, came into view less than 90 days from these large developments in Andersen's difficulties with the SEC regarding its work with both Sunbeam and Waste Management.

These "prior" acts were indisputably relevant to the question of Andersen's intent in its destruction of Enron-related documents. This was evidence of Andersen's actual experience with restating earnings and the inevitability of an SEC subpoena. It was evidence that Andersen knew its audit work would be at issue. Moreover, it was a powerful rebuttal of the testimony of Andersen's SEC expert, John Riley, that no SEC subpoena was expected until the end of the first week in November.

Andersen urges that evidence about Sunbeam and Waste Management could not be relevant, absent proof that the facts offered were known by a single person, a corrupt

persuader. It urges that it cannot be charged with the collective knowledge of all its agents. The government replies that the law is to the contrary, pointing to decisions of courts of appeals.[8] We need not resolve that debate. The notes of Nancy Temple, an in-house lawyer, make clear that she was keenly aware of the cease and desist order and the 102(e) censure proceedings in Waste Management, and that she viewed Waste Management and Sunbeam as a "model" for the Enron difficulties. There is much more. On November 6, Lawrence Rieger, a senior partner, sent an email to Temple with press accounts of the press releases by Sunbeam and Waste Management. He included an Andersen memorandum entitled "Action Steps in Response to Indications of Possible Restatement of Financial Statement." That document had been distributed to all U.S. partners. Goolsby, an Andersen partner, and John Riley had extensive knowledge of the proceedings in both Waste Management and Sunbeam and participated in conference calls with Andersen personnel addressing the Enron "crisis." Goolsby had signed the court papers in Waste Management. David Duncan, who had never worked on either Waste Management or Sunbeam matters, knew about those cases. It defies common sense to assert that partners in Andersen would not be informed about both of these cases. At the least, a jury could reasonably so conclude.

Andersen retreats to the contention that in any event there was too much detail about unproved charges, detail that was unnecessary and prejudicial. It points out that its offer to stipulate to the fact of the prior occurrences was not accepted. We are unpersuaded. The government was not required to accept a sterile recitation of the prior events. Rather, it was entitled to leave the clothes on these events, so recent. The district court carefully instructed the jury regarding the limits upon the evidence. Many of the

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8 *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987); *Steere Tank Lines, Inc. v. United States*, 330 F.2d 719, 724 (5th Cir. 1963).

documents were redacted before being sent into the jury room, and counsel had full opportunity to place the events in perspective through cross examination and closing argument. We find no abuse of discretion in the trial judge's weighing of the probative value of the evidence and the risk of collateral prejudice.

3

Andersen next contends that the district court erred in excluding evidence of statements made by Kathy Agnew during an interview with the FBI. According to Andersen, these statements would have enabled Andersen to impeach one of the government's key pieces of evidence suggesting a link between Andersen's decision to destroy documents and its concern over an SEC investigation of Enron.

During the testimony of Agent Sullivan, the agent supervising the FBI's investigation of Andersen, the government introduced notes taken by Agnew of an October 23, 2001, meeting with Andersen partner Thomas Bauer. In these notes, Agnew wrote: "Clean up documentation. SEC voluntary request. Two suits, more on the way." Andersen did not challenge the admission of Agnew's notes, attack Agnew's credibility, or attempt to introduce evidence of other statements made by Agnew while Agent Sullivan was on the stand. Several weeks later, however, the day before closing arguments, Andersen attempted to introduce an FBI report written by Agent Sullivan summarizing statements Agnew made about the October meeting. The report indicates that Agnew did not specifically remember the October 23 meeting, but she recalled that their goal was to ensure that the work papers were complete.

Andersen claims that the statements recorded in Sullivan's report were admissible under Federal Rule of Evidence 806 to impeach the out-of-court statements in her notes. We disagree. Rule 806 allows a party to attack the credibility of a declarant when a hearsay statement or a statement defined in Rule 801(d)(2)(C), (D), or (E) has been

admitted.[9] Rule 806 does not apply in this case, however, because the Agnew notes were not hearsay: the government did not admit them to prove the truth of the statements contained in them. The statements were instead admitted only to show that they were made and that Andersen knew that it was subject to SEC investigation. Because the statements were not hearsay, Rule 806 does not apply.

Indeed, Andersen effectively concedes this point in its reply brief, insisting that the notes were admitted for the truth of the proposition they "implicitly" advanced—that Andersen personnel were instructed to destroy documents because the SEC was conducting an inquiry. That the notes may have suggested a link between Andersen's document destruction and the SEC, however, does not alter the fact that the statements in the notes were not admitted for their truth.

Nonetheless, Andersen urges that Agnew's notes were admitted into evidence only under Rule 801(d)(2)(D) and that Rule 806 should, by its terms, allow for the admission of the FBI report. Andersen's argument is unpersuasive for several reasons. First, despite Andersen's claim, it is not apparent from the record that the district court relied on Rule 801(d)(2)(D) in admitting the notes because Andersen made no objection to their admission and the court did not address the matter directly. Since the notes were readily admissible as non-hearsay statements without regard to Rule 801(d)(2)(D), we will not presume that Rule 801(d)(2)(D) was the sole basis for their admission. Moreover, Andersen appears to assume that Rule 806 applies whenever a statement might have been admitted under Rule 801(d)(2)(D), even if it was in fact admitted on

[9] FED. R. EVID. 806. Rule 806 provides in pertinent part: "When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness."

other grounds. We do not read Rule 806 so broadly. As the Advisory Committee notes make clear, the purpose of Rule 806 was to allow for the impeachment of a hearsay declarant.[10] Because the statements in Agnew's notes were not hearsay at all, Rule 806 simply does not apply.

We conclude that the district court did not commit reversible error by refusing to admit the FBI reports of an interview with Agnew.

III

Andersen contends that the jury instructions were flawed in three ways: first in explaining the meaning of "corruptly persuades," then in misstating the element of "official proceeding," and finally in not instructing the jury that the government had to prove that Andersen knew that its destruction of records was unlawful.

"We review the rejection of a requested jury instruction for abuse of discretion, 'affording the trial judge substantial latitude in tailoring [the] instructions.'"[11] Reversal is required only if the requested instruction "1) is substantively correct; 2) was not substantively covered in the charge actually delivered to the jury; and 3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a defense."[12] No error results from a court's refusal to give an instruction that is not substantially correct in its statement of the law.[13]

1

Andersen was convicted of obstructing justice under what has come to be known as the "corrupt persuasion" prong of 18 U.S.C. § 1512(b)(2)(A)&(B). It provides:

[10] *See* FED. R. EVID. 806 advisory committee's notes.

[11] *United States v. Morales*, 272 F.3d 284, 289 (5th Cir. 2001).

[12] *Id.*

[13] *Id.*; *United States v. Dixon*, 185 F.3d 393, 402-03 (5th Cir. 1999).

> Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ... cause or induce any person to (A) ... withhold a record, document, or other object, from an official proceeding; [or] (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding ... shall be fined under this title or imprisoned not more than ten years, or both.

In this case, the charge read in relevant part:

> To "persuade" is to engage in any non-coercive attempt to induce another person to engage in certain conduct. The word "corruptly" means having an improper purpose. An improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding.

Andersen's principal argument is that the district court's definition of the term "corruptly" in § 1512(b)(2) renders the term superfluous. Andersen argues that, since § 1512(b)(2) explicitly requires that the accused act with the intent to withhold materials from an official proceeding, the term "corruptly" has no meaning under the district court's definition. Andersen urges that "corruptly persuades" requires more than an intent to withhold documents. Andersen contends that the term should be read to require either proof that the person persuaded violated an independent duty or that the person engaged in inherently culpable conduct, such as bribery.

The government challenges Andersen's basic contention that the term "corruptly" would have no independent meaning if defined as "an improper purpose." The government relies on the term's plain meaning, its definition in closely related statutes, the statute's structure, and

legislative history. Specifically, the government notes that courts have routinely defined the term "corruptly" in companion statutes like §§ 1503 and 1505[14] to require "an improper purpose."[15] In *United States v. Reeves*, for example, we defined the term to be an intent to "secur[e] improper benefits or advantages for one's self or for others."[16] The majority of circuits interpreting the term as used in § 1512(b) have reached a similar result, defining "corruptly" in terms of improper purpose despite the dim light it casts upon its meaning, its circularity aside.[17]

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[14] 18 U.S.C. § 1505 criminalizes, in relevant part, anyone who "corruptly ... influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or ... being had by either House, or any committee of either House or any joint committee of the Congress."

[15] *See United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978) (defining "corruptly" as "for an improper purpose" or "an evil or wicked purpose"); *United States v. Partin*, 552 F.2d 621, 641-42 (5th Cir. 1977).

[16] 752 F.2d 995, 1002 (5th Cir. 1985) (interpreting "corruptly endeavor" as related to obstructing the due administration of the tax laws).

[17] *United States v. Shotts*, 145 F.3d 1289, 1300-01 (11th Cir. 1998) ("It is reasonable to attribute to the 'corruptly persuade' language in Section 1512(b), the same well-established meaning already attributed by the courts to the comparable language in Section 1503(a), i.e., motivated by an improper purpose. We are unwilling to follow the Third Circuit's lead in imposing a requirement for an additional level of culpability on Section 1512(b) in the absence of any indication that Congress so intended and in the face of persuasive evidence that it did not."); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (finding § 1512(b) not to be unconstitutionally overbroad or vague because "Section 1512(b) does not prohibit all persuasion but only that which is 'corrupt[],'" and "[t]he inclusion of the qualifying term 'corrupt[]' means that the government must prove that the defendant's attempts to persuade were motivated by an improper purpose"); *see also United States v. Khatami*, 280 F.3d 907, 911-12 (9th Cir. 2002) ("Synthesizing these various definitions of 'corrupt' and 'persuade,' we note the statute strongly suggests that one who attempts to 'corruptly persuade' another is, given the pejorative plain meaning of the root adjective 'corrupt,' motivated by an inappropriate or improper purpose to convince another to engage in a course of behavior—such as impeding an ongoing criminal investigation."). *But see United*

We find Andersen's surplusage argument unpersuasive. Andersen's argument relies heavily on the Third Circuit's decision in *United States v. Farrell*.[18] In *Farrell*, a divided panel concluded that the term "corruptly persuades" in § 1512(b) did not proscribe "a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information ... from volunteering information to investigators."[19] In reaching its decision, the court specifically rejected the notion that the term could mean "persuades with the intent to hinder communication to law enforcement," concluding that such a definition "would render the word 'corruptly' meaningless."[20] The panel also dismissed the relevance of court decisions interpreting the term "corruptly" in companion statutes like § 1503.[21] Although these decisions had routinely defined the term to mean "with an improper purpose," the court found these decisions unpersuasive because of the differences between § 1512 and § 1503.[22] Unlike § 1512(b), § 1503 does not include any mens rea element except the term "corruptly." Section 1512(b), by contrast, expressly requires a specific intent to withhold documents from investigators. With this in mind, Andersen

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States v. Farrell, 126 F.3d 484, 490 (3d Cir. 1997) ("[B]ecause the 'improper purposes' that justify the application of § 1512(b) are already expressly described in the statute, construing 'corruptly' to mean merely 'for an improper purpose' (including those described in the statute) renders the term surplusage, a result that we have been admonished to avoid.").

18 126 F.3d 484 (3d Cir. 1997).

19 *Id.* at 488.

20 *Id.* at 487.

21 18 U.S.C. § 1503(a) provides, in relevant part, that "[w]hoever ... corruptly ... influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b)."

22 *Farrell*, 126 F.3d at 489-90.

asserts that a definition which makes sense in § 1503 becomes surplusage when applied to § 1512(b).[23]

The Third Circuit, however, did not define the term "corruptly" to *require* the violation of an independent legal duty, as Andersen claims.[24] Rather, it held the converse, that encouraging another to exercise a constitutional right is not corrupt.[25] The *Farrell* court specifically declined to define the term in any detail or to give substantive content to the term. Rather, the decision can fairly be read more narrowly: that a person who persuades someone to invoke his Fifth Amendment right does not violate the statute.

Andersen is incorrect, moreover, in its contention that the court's definition of "corruptly" rendered the term superfluous. The court defined "corruptly" to mean "an intent to subvert, undermine or impede the fact-finding ability of an official proceeding." Andersen contends that "corruptly" has no independent meaning under this definition because § 1512(b) already separately requires an intent to impede the fact-finding ability of an official proceeding. Section 1512(b), however, requires an "intent to impair the ... integrity or availability [of an object] for use in an official proceeding"; it does not focus on undermining an agency's fact-finding ability. In short, as defined by the court, "corruptly" was not a mirror of § 1512(b)'s intent requirement.

This point becomes more apparent when the charge is read in full. The district court instructed that "[a]n

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23 *Id.* at 490.

24 *Id.* at 488 ("[W]e are hesitant to define in more abstract terms the boundaries of the conduct punishable under the somewhat ambiguous 'corruptly persuades' clause. However, we do not think it necessary to provide such a definition here because we are similarly confident that the 'culpable conduct' that violates § 1512(b)(3)'s 'corruptly persuades' clause does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators.").

25 *Id.* at 488-89.

improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," including "subvert" and "undermine" as urged by Andersen.[26] Acting with an intent to "subvert, undermine, or impede" an investigation narrowed the reach of the statute, insisting upon a degree of culpability beyond an intent to prevent a document from being available at a later proceeding. A routine document retention policy, for example, evidences an intent to prevent a document from being available in any proceeding. But it does not alone evidence an intent to "subvert, undermine, or impede" an official proceeding. In narrowing the statute's potential reach, the district judge rejected the government's argument that the jury should be charged on the bare bones of the statute and shaped the charge to the facts of the case. It also gave meaning to "corruptly persuades." "Subvert" means "to overturn or overthrow from the foundation, ruin" or "to pervert or corrupt by an undermining of morals, allegiance, or faith." The most relevant definition of "undermine" is "to subvert or weaken insidiously or secretly." Impede means "to interfere with or get in the way of," to "hold up." Each of these terms implies a degree of personal culpability beyond a mere intent to make documents unavailable.

The legislative history of § 1512(b), explored by the dissent in *Farrell*, further persuades us that the district court's charge was correct.[27] Section 1512(b) was enacted to replace and expand the witness protection provisions incorporated in *§ 1503*. As initially drafted, § 1512(b) did not bar noncoercive conduct performed with an intent to hide information from investigators; one could violate the statute only through intimidation, use of physical force, threats, or misleading conduct. Congress added the term "corruptly

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[26] The limiting words "for this case" were included at Andersen's urging. The word "impede" was requested by the government and included over the objection of Andersen.

[27] *Farrell*, 126 F.3d at 491-93 (Campbell, J., dissenting).

persuades" in 1988 to "include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503." Congress knew that courts had uniformly defined "corruptly" in § 1503 as "motivated by an improper purpose," and it is logical to give the word "corruptly" in § 1512 the same meaning that it has in § 1503. At the very least, this legislative history—and its clear intent to criminalize non-coercive conduct—deflates Andersen's "structural" argument that § 1512 targets certain means used to obstruct justice and not just motive.[28]

We are persuaded that defining "corruptly" as "motivated by an improper purpose" comports easily with the legislative history. Congress intended that § 1512(b) have the same substantive scope as former § 1503. Since § 1503 proscribed conduct undertaken "with an improper purpose," § 1512(b) should also do so.

Andersen requested that the jury be instructed that the only way corrupt persuasion may be found is by an improper method or a violation of an independent legal duty. We find no court that has come to this conclusion. Andersen bases its argument on *Farrell*, but Andersen's description of the holding is an incomplete statement of the Third Circuit's viewpoint. *Farrell* made clear that a violation of an independent legal duty is sufficient to prove corrupt persuasion, and it refused to define "corruptly persuade" as acting with an improper purpose, but it did not hold that violating an independent legal duty or persuading by an

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[28] Andersen argued that the structure of the statute required the definition of "corruptly persuades" to be based on the means of persuasion used rather than the persuader's motive or intent. It points out that, before the statute was amended to include "corrupt persuasion," the statute criminalized only certain behaviors—namely, the use of intimidation or physical force, threats, and misleading conduct. Andersen argued that it would be anomalous to construe the term "corruptly persuades" differently; it must also be interpreted to require similarly culpable actions.

improper method was the only way to establish a § 1512(b) violation.[29] The statute itself has no such requirement.

Andersen, moreover, gives no explanation why "improper purpose" should require unlawful conduct. Under the caselaw, "corruptly" requires an improper *purpose*, not improper *means*,[30] and Andersen offers no explanation why "improper *purpose*" should require "improper means." Indeed, the means used would seem to be relevant only to the extent that they shed light on whether the purpose was improper. Moreover, the only examples of "unlawful conduct" that Andersen gives are bribery and counseling a witness to lie. The statute would have little independent reach, however, if it could be violated only through bribery or suborning perjury because such conduct is to a large extent criminalized in other provisions of the criminal code.[31] Yet Andersen offers no other examples of "culpable" or "unlawful" conduct sufficient, under its test, to trigger the statute. We cannot lightly conclude that Congress intended for the statute to do only work already done by the criminal code.

Finally, even ignoring Andersen's failure to request a substantially correct instruction, the submitted instruction survives harmless error review. Trial error is harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict," or leaves us in "grave doubt" as to whether it such an effect. On the facts of this

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[29] *Farrell*, 126 F.3d at 488-90 (explaining that it was "hesitant to define in more abstract terms the boundaries of the conduct punishable under the somewhat ambiguous 'corruptly persuades' clause," and finding it unnecessary to do so because the conduct at issue—"a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators"—could not satisfy the statute).

[30] *See, e.g.*, *U.S. v. Khatami*, 280 F.3d 907, 911-12 (9th Cir. 2002); *U.S. v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998); *United States v. Thompson*, 76 F.3d 442, 452-53 (2d Cir. 1996).

[31] 18 U.S.C. § 1622, for example, criminalizes subornation of perjury.

case, that the jury was not required to find a violation of an independent legal duty did not have a substantial and injurious effect on the verdict. The jury was instructed that to corruptly persuade another, Andersen must have acted with an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding. Contrary to Andersen's assertions, this instruction does not read "corruptly persuade" out of the statute. Acting with an intent to withhold a record from an official proceeding casts a wider net than acting with an intent to subvert, undermine, or impede the entire fact-finding ability of the proceeding. There is nothing improper about following a document retention policy when there is no threat of an official investigation, even though one purpose of such a policy may be to withhold documents from unknown, future litigation. A company's sudden instruction to institute or energize a lazy document retention policy when it sees the investigators around the corner, on the other hand, is more easily viewed as improper. The instruction's requirement of an improper purpose in withholding the documents ensures that the jury found a level of culpability over and above the mere intent to withhold a document from an official proceeding. We cannot say that the error had a substantial and injurious effect on the jury's verdict.

The court narrowed the reach of the statute at the urging of Andersen. Any error that occurred did not have a substantial and injurious effect on the jury's verdict.

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Andersen argues that the jury instructions were also flawed in their explanation of an "official proceeding."[32] The

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[32] The jury charge instructed:

> An "official proceeding" is a proceeding before a federal court, judge, or agency. In this regard, you are instructed that the Securities and Exchange Commission, otherwise known as the "SEC," is a federal agency, and that an "official proceeding," for this case, is a proceeding before a federal agency, such as the SEC. A proceeding before a

contention is that while § 1512(b)(2) provides that the proceeding "need not be pending or about to be instituted at the time of the offense,"[33] it does not offer guidance as to the concreteness of the defendant's expectation of a proceeding.

Andersen first contends that it was entitled to have the jury instructed that an "official proceeding" had to be "ongoing or ... scheduled to be commenced in the future." Resting on this court's decision in *United States v. Shively*,[34] the argument is that there must be proof of "intent to affect ... some particular federal proceeding that is ongoing or is scheduled to be commenced in the future."[35] The government argues, and we agree, that this statement was dicta, it having already concluded that the government failed to prove that the defendant intended to affect an official proceeding. This reconciles *Shively* with the plain language of the statute, an accommodation that we should prefer over a reading that defies the statutory provision that an official proceeding "need not be pending or about to be instituted at the time of the offense."

Andersen next maintains that it was entitled to an instruction to the jury that it could not be found guilty unless at the time of the obstructing act it "had in mind a particular proceeding that it sought to obstruct." In addition to its reliance upon *Shively*, Andersen argues that

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federal agency includes all of the steps and stages in the agency's performance of its governmental functions, and it extends to administrative as well as investigative functions, both formal and informal. For purposes of this case a civil law suit brought by private litigants is not an official proceeding.

The charge goes on to explain that "the government need prove only that Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, that is, a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served."

[33] 18 U.S.C. § 1512(e)(1).

[34] 927 F.2d 804, 812-13 (5th Cir. 1991).

[35] *Id.*

Congress could not have intended to criminalize the widespread use of records retention programs, all of which have a general purpose of not retaining documents that might be helpful to some later appearing adversary—that this court should read the statute to insist upon proof that a defendant intended to impede a particular proceeding. The argument anticipates a government argument that this is fanciful, pointing out that the prosecution argued just that in ascribing criminal intent to Michael Odom's statement in a videotaped meeting with employees that the records retention policy should be followed because it would make records unavailable in possible future litigation—even though it asserts his remarks were unrelated to Enron. Indeed, it argues, the jury asked to see the video during its deliberations. This, it urges, makes clear that the jury was allowed to convict for acts that do not violate the statute.

This contention is not without force, but it fails here. Andersen's requested instruction is in tension with the congressionally detailed reach of the statute. It ignores the statutory language, which does not require a defendant to know that the proceeding is pending or about to be initiated.[36] Its stronger argument is that without insisting that a defendant's intent to impede a proceeding have some limiting sights, companies could be convicted for maintaining records retention programs which were adopted with no proceeding in mind. The answer here may lie with the sound application of the elements of corrupt purpose and intent. That case is not before us.

Ultimately, we find no reversible error. Wherever the permissible reach of this statute may be finally drawn, it is beyond this case. This case was tried on the theory that Andersen intended to undermine, subvert, or impede a proceeding of the SEC. The government did not suggest that a records retention program violated the Act. Rather, it argued that Andersen used that policy as a code to

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[36] *See* 18 U.S.C. § 1512(b), (f).

shred—to subvert, undermine, or impede a government proceeding it knew was imminent. There was no risk of conviction for innocent maintenance of a records program. That the SEC was the feared opponent and initiator of a proceeding and not some other shadowy opponent was clear at every step. That is how the case was tried and the jury charged. Prosecutor Matthew Freidrich in the first opening statement of the government told the jury:

> They knew that the SEC was coming ... they knew what that could mean to the firm ... and the reason that they knew that was because Andersen—at the time these events that are set out in the indictment happened, Andersen was already under a form of probation with the SEC ... if Andersen was found to, again, have violated securities laws, they could have their ticket pulled, meaning they could be debarred. They could be stopped from practicing accounting in front of the SEC, and that would have meant the end of the practice. ... [T]his case is all about a group of partners at Andersen who knew that the law was coming and did what they could ... to hinder the law. And at the end of the trial, we will ask you to find them guilty of that.

This case, as charged[37] and tried, was well within the statute. We cannot find reversible error in the trial court's rejection of Andersen's request to add to the definition of an official proceeding that it be a particular proceeding.

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Finally, Andersen argues that the district court erroneously charged the jury by not instructing that "a

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[37] The indictment alleged, "In the summer and fall of 2001, a series of significant developments led to ANDERSEN's foreseeing imminent civil litigation against, and government investigation of, Enron and ANDERSEN." The jury was instructed in the court's final charge that "for purposes of this case a civil law suit brought by private litigants is not an official proceeding."

conviction under section 1512(b)(2) is permissible only if the defendant is shown to have known that its conduct was wrongful." It asserts that because persuading another to withhold documents from an official proceeding is not necessarily culpable conduct, Congress must have intended "corruptly" to shield those who act without knowledge of their unlawful conduct from culpability.

The government responds, and we agree, that the jury was properly instructed because knowledge of one's violation is not an element of § 1512(b)(2). The general rule, of course, is that ignorance of the law is no defense.[38] When Congress wishes to avoid the general rule, it usually does so by requiring that a defendant act willfully or with specific intent to violate the law.[39] Section 1512(b)(2) does not require that the defendant act willfully, and does not provide that a defendant may be convicted only if the defendant knows his conduct is unlawful. Andersen's argument misses the import of the jury's finding that it acted with an improper purpose; one could act with an improper purpose even if one did not know that the actions were unlawful. The instructions required the jury to find the appropriate mental states for a § 1512(b)(2) violation: the jury could convict Andersen only if it found that Andersen intended to subvert, undermine, or impede the fact-finding ability of an official proceeding. The district court did not err by refusing to give an "ignorance of the law" instruction.

IV

Andersen challenges two additional rulings of the district court involving the cross-examination of David Duncan and remarks made by the prosecutor in his closing argument. We find no reversible error.

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[38] *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994).

[39] *Id.* at 143-46; *Cheek v. United States*, 498 U.S. 192, 199-200 (1991).

Inappropriate and harmful comments made during closing argument may constitute reversible error.[40] When reviewing alleged improper comments, we first determine whether the comments were improper and then decide whether they caused harm.[41] "Improper argument harms the defendant if it affects his substantial rights."[42] Finally, "it is necessary to look at [the challenged remarks] in context."[43]

The comments at issue here involve an email written by Rodney Faldyn demonstrating Andersen's adoption of a previously rejected accounting practice that allowed Enron to avoid a restatement of earnings. At least one copy of the email was deleted during the document destruction, but copies of the email survived. During its opening statement, the prosecution said, "you won't find another copy of this [email] anywhere in evidence. Do you think the SEC would have wanted to see this document?" At a bench conference, Andersen informed the court that a copy of the email was in fact produced to the SEC. The prosecution told the court that it would not have made the statement if it knew that a copy was produced, and the court found that the prosecution acted in good faith. To cure any confusion, the district court instructed the jury that despite the government's good faith belief, "an undeleted copy of the document exists and [] it was produced to the SEC pursuant to the subpoena. ... [Y]ou are not to consider any arguments regarding whether or not another copy of that document was preserved."

During rebuttal summation, the government again referred to the Faldyn email as evidence of Andersen's change of accounting practice in relation to Enron. In response to Andersen's argument that it destroyed only

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40 *United States v. Simpson*, 901 F.2d 1223, 1227 (5th Cir. 1990).

41 *United States v. Gallardo-Trapero*, 185 F.3d 307, 320 (5th Cir. 1999).

42 *Simpson*, 901 F.2d at 1227.

43 *Gallardo-Trapero*, 185 F.3d at 320.

unimportant documents, the government noted that the Faldyn email was deleted and said, "ask yourselves, the SEC, would you want this?" Andersen objected, asserting that the prosecutor's argument ignored the court's previous instruction to the jury that the SEC received a copy of the email. The court overruled the objection, and the prosecutor went on to explain to the jury that even if copies of the email survived and were produced, one deletion alone was significant. That some Andersen employees "didn't get the message" to destroy documents, the argument goes, does not indicate that Andersen was not attempting to destroy important documents. The government argued further that the destruction of a copy of an important document is significant because a copy could indicate who had the document, when the person received it, and whether the person destroyed it.

Andersen moved for a mistrial after closing arguments, and the court denied the motion. The court disagreed with Andersen's contention that the prosecution simply repeated its confusing remarks from opening statements, noting that the prosecutor indicated that there were other copies of the email and "never said this was the only document"; rather, the prosecutor asked, "wouldn't the SEC have liked to have seen that."

Andersen asserts that the rebuttal comments "created the incorrect impression that Andersen had deleted all copies of the email." Andersen views the rebuttal comments as misleading and misstating the evidence, and contends that because the discussion of the Faldyn email was a significant portion of the government's rebuttal, a new trial is warranted.

We find no prosecutorial misconduct here. The comments made during rebuttal were different from the remarks made during opening statement. The opening statement remark that no copy of the email would be found in evidence could have confused the jury by implying that all copies of the email were destroyed. In contrast, the rebuttal comments highlighted the email's importance, asserted that

the SEC would want to see it, and noted that at least one copy of it was deleted. The prosecutor did not claim that all copies of the email were destroyed or that no copy of the email was received by the SEC; rather, the prosecutor argued that destruction of one copy alone demonstrates the document's incriminating nature and Andersen's intent to keep it from the SEC, even if other copies eventually were produced. The court did not err in finding that these comments were not improper and denying Andersen's request for a mistrial.

2

Andersen asserts that the district court "prejudicially handicapped [its case] by undermining the cross-examination of David Duncan." It claims that the basis of its cross-examination of Duncan was four summaries of interview sessions ("FD-302 forms") between Duncan and the FBI drafted by FBI agents after the interviews. During his cross-examination, Duncan said that the four FD-302s forms contained various inaccuracies and misstatements. The court sustained the government's objection to Andersen's attempt to cross-examine Duncan regarding the discrepancies between his recollection and the summaries. Andersen requested an evidentiary hearing to determine the nature of the inaccuracies, and the government explained that Duncan marked his own copies of the summaries, highlighting portions he felt were inaccurate. The court conducted an *in camera* review of three of Duncan's copies of the summaries, finding that none of the inconsistencies were material. Rather, the court found that Duncan's notations referred to specific words or phrases, making it "more likely that Duncan, a precise accountant, meant by his highlighting that the agent failed to capture in his prose the precise flavor of what Duncan recalled as his actual statement." The court accordingly denied Andersen's motion for an evidentiary hearing.

Based on these events, Andersen presents two claims of error: (1) the district court exerted insufficient effort to

determine the materiality of misstatements in the FD-302 forms, and (2) the court's failure to provide the marked FD-302 forms crippled Andersen's ability to effectively cross-examine David Duncan.

Andersen provides no authority to justify reversal of the jury's verdict, and we find none. To the contrary, Andersen's various assertions are belied by the underlying events. First, the facts demonstrate that Andersen had everything it needed to effectively cross examine Duncan. Duncan's cross-examination lasted three days and covered a wide range of topics. Andersen could have questioned Duncan about his statements to the FBI and then compared his statements to the summaries drafted by the FBI agent. Andersen then could have highlighted to the jury any inconsistencies between his testimony and the summaries, and could have called the FBI agent who drafted the summary to explore the discrepancies. Andersen did not take these opportunities below, perhaps because impeaching Duncan's credibility would undermine its admitted strategy of using Duncan's testimony to support its own defense.

Second, Andersen did not present to the court below one of its primary complaints—that the court could not adequately determine the materiality of the inconsistencies because the court reviewed only three of the four summaries marked by Duncan. Andersen did not complain to the district court that the court's review was insufficient by failing to review the fourth summary. Furthermore, it was Duncan's attorney, not the government, who possessed and provided the marked summaries, but Andersen did not inquire as to why the fourth summary was not provided.

Given that Andersen provides no authority explaining why the court's actions and findings require reversal, and that the facts undermine its assertion that it could not effectively cross-examine Duncan, we find no reversible error.

V

For these reasons, we AFFIRM the judgment of conviction.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[CLERK, U.S. DISTRICT COURT]
[SOUTHERN DISTRICT OF TEXAS]
[ENTERED]
[5/24/02]
[MICHAEL N. MILBY, CLERK]

UNITED STATES OF AMERICA,	}	
Plaintiff	}	
v.	}	CRIMINAL ACTION NO. H-02-121
ARTHUR ANDERSEN LLP,	}	
Defendant.	}	

MEMORANDUM OPINION

On April 29, 2002 the government filed an In Limine Memorandum of Law Regarding Evidentiary Issues and Jury Instructions. (Document No. 37). On May 3, Andersen filed its response to the Government's memorandum. (Document No. 56). In the memorandum and response, the parties briefed their positions on various points of law including: (1) the admissibility of evidence relating to SEC regulatory actions and sanctions arising out of Andersen's audit work for Waste Management and Sunbeam; (2) the definition of "corruptly" as used in Title 18 U.S.C. § 1512(b); (3) whether a defendant must have knowledge that his conduct is illegal to be convicted under § 1512(b); and (4) whether a preliminary inquiry by the SEC qualifies as an "official proceeding" under § 1512(b)(2)(B) and if the inquiry must be ongoing or scheduled at the time the alleged offense

occurred. After carefully reviewing the parties' briefs on the issues and the relevant law, the Court concludes that (1) evidence relating to Andersen's audit work for Waste Management and Sunbeam is admissible; (2) the word "corruptly" as used in § 1512(b) is properly defined as acting "with an improper purpose"; (3) a defendant need not know that his conduct is illegal to be convicted under § 1512(b); and (4) a preliminary inquiry by the SEC is an official proceeding and that the proceeding need not be ongoing or scheduled at the time the alleged offense occurred.

* * *

II. Meaning of "corrupt persuasion"

Title 18 U.S.C. Section 1512(b) states, in relevant part:

> [w]hoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ... (2) cause or induce any person to ... (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding ... shall be fined ... or imprisoned ... or both."

(emphasis added). According to the government, a defendant "corruptly persuades" when he, with "an improper purpose," attempts "to induce another person to engage in certain conduct." (Gov't's Proposed Revised Jury Instr., p. 31). Applying this definition, the government's proposed jury instructions state:

> Thus, if you find beyond a reasonable doubt that an agent, such as a partner, of the Andersen firm acting within the scope of his or her employment induced or attempted to induce a firm employee or partner or some other person to engage in certain conduct and that the agent did so with the intent to obstruct an official proceeding, then you may find

> that the Andersen firm committed the first element of the charged offense.

(Id. at p. 32).

Andersen contends, however, that "corruptly" must be defined more narrowly than "improper purpose." Specifically, Andersen argues that a defendant acts corruptly where he "(1) uses an improper method, such as bribery or other unlawful means, to induce that person to act; or (2) persuades the other person to do something that they would not have had a lawful right to do had they been acting on their own." (Def.'s Proposed Jury Intr., p. 7)

The Fifth Circuit has not defined the word "corruptly" as used in § 1512(b)(2). However, in § 1512's predecessor statute, 18 U.S.C. § 1503, the Court defined acting "corruptly" to mean to act "with improper motive or with bad or evil or wicked purpose." *United States v. Partin*, 552 F.2d 621, 641-42 (5th Cir. 1977) (quoting *United States v. Ryan*, 455 F2d 728, 734 (9th Cir. 1972) (holding that "The word 'corrupt' in the statute means for an evil or wicked purpose."); *see United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978) (holding that "The term 'corruptly' means for an improper motive) (citing *Martin v. United States*, 166 F.2d 76, 79 (4th Cir. 1948)). The Fifth Circuit pattern jury instructions state that a defendant acts "'corruptly,' that is, knowingly and dishonestly, with the specific intent to subvert or undermine the integrity of the court proceeding in which the juror served." § 2.67 (2001). Furthermore, in another statute dealing with obstruction of the administration of internal revenue laws, 26 U.S.C. § 7212(a), the Fifth Circuit defined "corruptly" as an intent to "secur[e] improper benefits or advantages for one's self or for others." *United States v. Reeves*, 752 F.2d 995, 1002 (5th Cir. 1985).

The legislative history of § 1512 suggests that the Fifth Circuits's interpretation of "corrupt" in § 1503 should be applied to § 1512 as well. Section 1512 was enacted in 1982 to replace and expand the witness protection provisions of

§ 1503. However, when § 1512 was originally enacted, Congress neglected to include the phrase "corruptly persuades." In *United States v. King*, the Second Circuit found the omission significant. The Court held that while § 1503 had been interpreted to extend to non-coercive conduct through the "corruptly endeavors" clause, Congress must not have intended to penalize such conduct in § 1512 because the "corruptly" phrase had been omitted. Accordingly, the court concluded that Congress did not intend to penalize a "nonmisleading, nonthreatening, nonintimidating attempt to have a person give false information to the government ..." 762 F.2d 232, 238 (2nd Cir. 1985). The Second Circuit noted that if Congress wished to penalize non-coercive conduct in § 1512, it would have to amend the statute. In 1988 Congress, referring to the *King* case, amended § 1512 to prohibit "corruptly persuading." Therefore, the legislative history of § 1512 suggests that in amending the statute to include the phrase "corruptly persuades" Congress intended to prohibit non-coercive activity covered by the "corruptly" phrase in § 1503. Because the Fifth Circuit interpreted "corruptly" in § 1503 as "with an improper motive" or wicked purpose, the same meaning must be applied to "corruptly" in § 1512.

Moreover, the case law supports the improper purpose interpretation of § 1512. In *United States v. Khatami*, a woman under investigation by the Social Security Administration told potential witnesses "not to tell [investigators] anything." 280 F.3d 907, 909 (9th Cir. 2002). In upholding Khatami's conviction under § 1512(b), the Ninth Circuit concluded that the plain meaning of "corruptly" was to be "motivated by an inappropriate or improper purpose ..." *Id.* at 911. In *United States v. Shotts*, the defendant was convicted under § 1512(b) for telling his secretary to "not say anything" to the FBI. In defining "corruptly persuade," the Eleventh Circuit held that "It is reasonable to attribute to the "corruptly persuade" language in Section 1512(b), the same well-established meaning already attributed by the courts to the comparable

language in Section 1503(a), i.e., motivated by an improper purpose." 154 F.3d 1289, 1301 (11th Cir. 1998). Similarly, in *United States v. Thompson*, the Second Circuit stated that the term "corrupt" "means that the government must prove that the defendant's attempts to persuade were motivated by an improper purpose."

Andersen, relies primarily on two cases in support its narrower interpretation of § 1512(b). In *United States v. Farrell*, a criminal defendant attempted to persuade a co-conspirator not to reveal information about their conspiracy to federal investigators. 126 F.3d 484 (3d Cir. 1997). The Third Circuit held that the defendant could not be convicted under § 1512(b), because the it is not "corrupt" to convince someone to exercise a constitutional right to remain silent. *Id.* at 488. In reaching its conclusion, the court rejected the government's proposal that corruptly be defined as "improper purpose." *Id.* at 490. The court reasoned that the statute appears to define what the improper purposes are: persuading someone to withhold testimony, destroy documents, be absent from official proceedings, and the like. Because the statute includes specific improper purposes, defining "corruptly" as "with an improper purpose" renders the term mere surplusage, a result to be avoided. Therefore, the court concluded that the term must be read to include some form of conduct more culpable than "improper purpose." In *United States v. Davis*, the Third Circuit upheld a defendant's conviction for corruptly persuading under § 1512(b), but appeared to confirm the court's more restrictive reading of corruptly persuades in *Farrell* defining "corrupt" as an attempt to influence another to violate a legal duty. 189 F.3d 231, 248 (3d Cir. 1999).

However, the Third Circuit precedent relied on by Andersen is less than clear on what meaning should be attributed to "corruptly." First, in a more recent case, the Third Circuit appears to have retreated from its narrow definition of the phrase. In *United States v. Applewhaite*, the defendant's husband was assaulted by her boyfriend

outside her home. 195 F.3d 679 (3d Cir. 1999). In an effort to cover up evidence of the assault, the defendant hired a worker to paint a wall and dig up a flowerbed where blood had been splattered. After a jury trial, the woman was convicted under § 1512(b) for corruptly persuading another to destroy evidence. On appeal, the defendant argued that the evidence at trial was insufficient to establish that she persuaded someone to destroy evidence. *Id.* at 687. The Third Circuit disagreed, stating that evidence that the wall had never been painted before, that it was painted the morning after the crime, and that forensic evidence revealed the husband's blood on the wall and in the soil was enough to show that the wall was painted to cover up evidence. *Id* at 688 Furthermore, testimony by the defendant's neighbors that she was seen painting the wall with a young man on the morning after the crime was enough to show that she had persuaded another to help her destroy the evidence of the assault. *Id.*

In reaching its holding the *Applewhaite* Court did not cite Farrell or Davis. Indeed, the result in *Applewhaite* appears inconsistent with the Court's prior holdings. Painting a wall or digging up a flowerbed is, by itself, completely benign. Similarly, hiring a worker to paint or dig does not suggest culpable conduct. Her action was culpable only because her purpose was to cover up evidence of a crime. In other words, her purpose in persuading the worker to help her paint and dig was improper. This holding directly contradicts the Court's earlier definition of "corruptly" in *Davis*. In *Davis* the Court defined corruptly persuade as the act of persuading another to violate a legal duty.

The evidence in *Applewhaite* did not suggest that the defendant persuaded the worker to violate a legal duty. She simply hired the worker to paint and dig, neither of which is illegal. *Applewhaite* suggests, therefore, that the Third Circuit has moved towards the broader interpretation of "corruptly" embraced by the majority of other circuits.

Andersen further argues that "corruptly" should not be defined as "improper purpose" because it renders the term surplusage. This assertion, however, is not correct. The dissenting judge in *Farrell* explained that a mother urging her son to invoke his Fifth Amendment right to remain silent is technically urging her son to "withhold testimony," which is prohibited by § 1512(b). However, urging one's child to exercise a constitutional right is not an act that Congress likely sought to criminalize. If "corruptly" is defined as "with an improper purpose" the mother's action is not criminalized by § 1512(b), her purpose was not improper. Consequently, when defined as "improper purpose," the word "corruptly" is not superfluous.

Consequently, the Court concludes that "corrupt" is properly defined as acting "with an improper purpose." The Fifth Circuit adopted this definition in § 1512's predecessor statute. The majority of circuits to address the question adopted the improper purpose definition. Furthermore, while the Third Circuit initially embraced a more narrow definition of the term, the *Applewhaite* case suggests that the court is moving towards the improper purpose standard. In fact, the facts of the *Applewhaite* case are strikingly similar to the alleged wrongdoings by Andersen. The defendant in Andersen persuaded someone under her employ to perform an action which, by itself, was benign, but resulted in the destruction of evidence. In the present case, the indictment alleges that partners or agents of Andersen persuaded others to shred documents (which is not itself culpable conduct) with the intention of keeping the information from the SEC.

III. Knowledge of the wrongfulness of actor's conduct

Andersen argues that "[a]t the very least, [it] is entitled to an instruction making it clear that persuasion is not 'corrupt' unless the actor knows that his conduct is unlawful." (Def.'s Resp. to Gov't's In Limine Mem., p. 19). In other words, Andersen asserts that if the defendant does not understand that his conduct violates the law, the defendant did not possess the state of mind required for

conviction under § 1512(b). In support of its contention, Andersen cites *United States v. Frankhauser*, in which the defendant persuaded a coconspirator's mother to clear out her son's room before the F.B.I. obtained a warrant to search it. 80 F.3d 641 (1st Cir. 1996). In upholding the defendant's conviction under § 1512(b), the First Circuit noted that the evidence indicated that Frankhauser had the necessary *mens rea* under § 1512(b) because there was evidence that he had previously been convicted for participating in a conspiracy to obstruct justice by advising the destruction of documents. *Id.* at 652. The defendant's specific knowledge that advising another to destroy documents violated the law, the Court noted, "gave him notice that his advice to [his coconspirator's mother] was illegal, thus establishing that he acted with corrupt intent to violate the law." *Id.* Based on *Franhauser*, Andersen argues that a conviction under § 1512(b) requires knowledge that one's conduct violates the law.

The Court, however, concludes that Andersen's interpretation of *Frankhauser* is incorrect. In *Frankhauser*, the Court did not hold that a defendant *must* know that his conduct is illegal under § 1512(b). The Court stated that the First Circuit had yet to "decide what state of mind a defendant must have with respect to an official proceeding in order to violate section 1512 ..." *Id.* Instead of defining the requisite *mens rea*, the Court concluded that because the defendant had specific experience of the law he violated, he clearly had the requisite *mens rea*, whatever it is. In other words, the Court did not hold that knowledge is a necessary condition, only that it is sufficient.

In fact, the case law clearly demonstrates that specific knowledge of the law is not required under § 1512(b). In *United States v. Mullen*, the defendant requested that the district court instruct the jury that to be convicted under § 1512 there must be proof that the defendant "knowingly did an act which the law forbids ..., purposely intending to violate the law." 22 F.3d 1365, 1369 (6th Cir. 1994). The court refused, however, concluding that specific knowledge

that one's conduct violates the law is not required under § 1512. The court instructed the jury that the government must prove that "the defendant ... corruptly endeavored to influence, obstruct, or impede the due administration of justice ... with the intent of purpose of obstruct. [*sic*]" *Id.* On appeal, the Sixth Circuit held that the district court's instructions "accurately and succinctly convey the mental states necessary for conviction under 18 U.S.C. §§ 1503, 1512. Furthermore, convictions under § 1512(b) are routinely upheld despite the fact that the defendant was unaware of § 1512(b) at the time the offense was committed. *See Khatami*, 280 F.3d at 912; *Applewhaite*, 195 F.3d at 688; *Davis*, 183 F.3d at 250; *Shotts*, 145 F.3d at 1299-1303. Accordingly, the Court concludes that a defendant need not be aware that his conduct is illegal to be convicted under § 1512(b).

IV. Meaning of "Official Proceeding" under § 1512(b)

In its proposed jury instructions the parties dispute the meaning of "official proceeding" under § 1512(b) with respect to the actions of the SEC. First, Andersen contends that a preliminary inquiry by the SEC does not constitute an official proceeding. Second, Andersen's instructions that an "official proceeding must be one that is ongoing or has been scheduled to be commenced in the future." (Def.'s Proposed Jury Instr., p. 5). The government disputes both assertions.

Preliminary Inquiry by SEC. As used in § 1512, an "official proceeding" is "a proceeding before a Federal Government agency which is authorized by law ..." 18 U.S.C. § 1515(a)(C). The SEC is clearly an agency which is authorized by law. The question is whether an "inquiry" qualifies as a "proceeding." The case law states that a "proceeding" is not restricted to formal adjudicative process. *Rice v. United States*, 356 F.2d 709, 713 (8th Cir. 1966). Rather, an agency's investigative process also qualifies as a "proceeding." *Id.*; *see also United States v. Sutton*, 732 F.2d 1483, 1490 (10th Cir. 1984) ("Agency investigative activities are 'proceedings' within the meaning

of § 1505[, predecessor of § 1512]"). "[I]t would be absurd to hold that Congress meant to proscribe interference with the administrative process only after [an agency] proceeding had reached a certain formal stage and let go unpunished individuals who obstruct earlier preliminary proceedings." *Rice*, 356 F.2d at 712. Moreover, while some court's have held that police investigations by the FBI and U.S. Attorney's Office are not "official proceedings" the Seventh Circuit recently held that an investigation by the SEC is a proceeding distinct from a police investigation. *United States v. Senffner*, 280 F.3d 755, 761 (7th Cir. 2002). Moreover, in *Senffner* the court noted that an SEC investigation is a proceeding even when it is being conducted outside the authority to issue subpoenas and administer oaths. *Id.* Accordingly, the Court concludes that a preliminary investigation by the SEC is an official proceeding under § 1512(b)(2).

Ongoing or Scheduled. Relying on *United States v. Shively*, Andersen argues that § 1512(b) is not violated unless the "official proceeding" is ongoing or scheduled at the time the document destruction occurred. 927 F.2d 804 (5th Cir. 1991). *Shively*, however, does not support Andersen's argument. In *Shively*, the defendant threatened a potential state civil court witness. Two and a half years later, Shively was indicted and convicted for the threat under § 1512(b) for obstructing a proceeding before a federal grand jury. The Fifth Circuit reversed the conviction, holding that "[w]ithout at least a circumstantial showing of intent to affect testimony at some particular federal proceeding that is ongoing or is scheduled to be commenced in the future, this statute does not proscribe his conduct." *Id.* at 812-13. The reasoning behind the Fifth Circuit's ruling in *Shively* was that at the time the threat was made, the grand jury proceedings, which he was alleged to have been obstructing, were over two years away. Without even the remote connection between the obstruction and the proceeding, the conviction could not be sustained. Subsequent courts have held, however, that *Shively* does

not stand for the proposition that the proceeding *must* be ongoing or scheduled, only that it not be too remote to connect the obstruction to the proceeding. In *Frankhauser*, the court noted that "[w]e do not adopt the Shively opinion insofar as it may indicate that a defendant in every case must actually know that an official proceeding has been commenced or scheduled ... Each case must be evaluated on its own facts." 80 F.3d at 652. In *United States v. Kelley*, the court cited *Shively* in holding that § 1512 is violated if the defendant "fear[ed] that a grand jury proceeding had been or might be instituted." 36 F.3d 1118, 1128 (D.C. Cir. 1994).

Accordingly, the Court holds that a preliminary inquiry by the SEC constitutes an official proceeding under § 1512(b)(2)(B). Furthermore, convictions under § 1512(b) do not require that the proceeding be ongoing or scheduled.

SIGNED at Houston, Texas, this 24th day of May, 2002.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	:	Criminal Action
	:	No. H-02-121
vs.	:	Houston, Texas
	:	
ARTHUR ANDERSEN, LLP,	:	June 5, 2002
Defendant	:	9:19 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MELINDA HARMON
AND A JURY

* * *

THE COURT: * * *

Specific instructions. The indictment charges in relevant part, quote, on or about and between October 10, 2001, and November 9, 2001, within the Southern District of Texas and elsewhere, including Chicago; Illinois; Portland, Oregon; and London, England, Andersen, through its partners and others, did knowingly, intentionally, and corruptly persuade and attempt to persuade other persons, to wit, Andersen employees with intent to cause and induce such persons to, A, withhold records, documents, and other objects from official proceedings; namely, regulatory and criminal proceedings and investigations and, B, alter, destroy, mutilate, and conceal objects with intent to impair the object's integrity and availability for use in such official proceedings.

Title 18, United States Code, Sections 1512(b)(2) and 3551 and following. Title 18, United States Code, Section 1512(b) provides that—I'm sorry. I should have said close quote.

Now, starting again, Title 18, United States Code, Section 1512(b) provides that, quote, whoever knowingly and corruptly persuades another person, or attempts to do so, with intent to cause or induce any person to withhold a record, document, or other object from an official proceeding or alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding shall be guilty of a crime, close quote.

In order to prove Andersen's guilt—I'm sorry. In order to prove Andersen guilty of violating this provision, the Government must prove each of the following two elements beyond a reasonable doubt:

First, that on or about the dates charged, the Andersen firm through its agents corruptly persuaded or attempted to corruptly persuade another person or persons; and second, that Andersen through its agents acted knowingly or with intent to cause or induce another person or persons to, A, withhold a record or document from an official proceeding or, B, alter, destroy, mutilate, or conceal an object with intent to impair the object's availability for use in an official proceeding.

A, quote, official proceeding, close quote, is a proceeding before a federal court, judge, or agency. In this regard, you are instructed that the Securities and Exchange Commission, otherwise known as the SEC, is a federal agency, and that a, quote, official proceeding for this case is a proceeding before a federal agency such as the SEC.

A proceeding before a federal agency includes all of the steps and stages in the agency's performance of its governmental functions and it extends to administrative as well as investigative functions, both formal and informal. For purposes of this case, a civil lawsuit brought by private litigants is not an official proceeding.

For the first element, to determine whether Andersen corruptly persuaded, quote, another person, close quote, an employee or partner of Andersen is considered, quote, another person, close quote. To, quote, persuade, close

quote, is to engage in any non-coercive attempt to induce another person to engage in certain conduct.

The word, quote, corruptly, close quote, means having an improper purpose. An improper purpose for this case is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding.

In order to establish this corrupt persuasion element, the Government must prove that the agent of Andersen who engaged in the persuasion, not the other person persuaded, possessed the improper purpose. The improper purpose need not be the sole motivation for the Defendant's conduct so long as the Defendant acted, at least in part, with that improper purpose.

Thus, if you find beyond a reasonable doubt that an agent, such as a partner, of Andersen acting within the scope of his or her employment induced or attempted to induce another employee or partner of the firm or some other person to withhold, alter, destroy, mutilate, or conceal an object and that the agent did so with the intent, at least in part, to subvert, undermine, or impede the fact-finding ability of an official proceeding, then you may find that Andersen committed the first element of the charged offense.

The second element of the charged offense—obstruction offense is that Andersen, through its agents, acted knowingly and with the intent to cause or induce another person to withhold a record or a document from an official proceeding or to alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding.

An act is done with the intent to impair the integrity or availability of a document or object only if it is undertaken with the specific purpose of making the document or object unavailable for use in an official proceeding.

However, the Government is not required to prove that Andersen's sole or even primary intent was to cause another person to make a document or object unavailable for use in an official proceeding. You may find that this intent element

has been established if you conclude that Andersen acted, at least in part, with the intent to cause another person to make a document or object unavailable for use in an official proceeding.

In order to establish that Andersen committed the charged offense, it is not necessary for the Government to prove that an official proceeding was pending or even about to be initiated at the time the obstructive conduct occurred. Nor is it necessary for the Government to prove that a subpoena had been served on Andersen or any other party at the time of the offense.

The Government need only prove that Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, that is, a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served.

Furthermore, it is not necessary for the Government to prove that Andersen knew that its conduct violated the criminal law. Thus, even if Andersen honestly and sincerely believed that its conduct was lawful, you may find Andersen guilty if you conclude that Andersen acted corruptly and with the intent to make documents unavailable for an official proceeding.

Moreover, the Government is not required to prove that Andersen was successful or likely to succeed in subverting, undermining, or impeding the fact-finding ability of an official proceeding. Nor is the Government required to prove that Andersen was successful or likely to succeed in making documents unavailable for that proceeding. It is Andersen's purpose and intent, not the success of its effort that the Government must prove as elements of the charged offense.

* * *

AO 245E (3/96) Judgment in a Criminal Case for Organizational Defendants
Sheet 1

United States District Court
Southern District of Texas

United States of America
v.
Arthur Andersen LLP.

Judgment in a Criminal Case
(For Organizational Defendants)

Case Number: 4:02CR00121-001

Rusty Hardin
Defendant Organization's Attorney

[CLERK, U.S. DISTRICT COURT]
[SOUTHERN DISTRICT OF TEXAS]
[ENTERED]
[10/21/02]
[MICHAEL N. MILBY, CLERK]

THE DEFENDANT ORGANIZATION:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1 on June 15, 2002 after a plea of not guilty.

Title & Section	Nature of Offense	Date Concluded	Count Number(s)
18 U.S.C. § 1512(b)2) and § 3551 et. seq.	Obstruction of Justice	11/09/2001	1

The defendant organization is sentenced as provided in pages 2 through 5 of this judgment.

☐ The defendant organization has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant organization shall notify the United States Attorney for this district within 30 days of any change of name, principal business address, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant Organization's Federal Employer I.D.
36-0732690

Defendant Organization's Principal Business Address:

33 West Monroe Street
18th Floor
Chicago, IL 60603-5385

October 16, 2002
Date of Imposition of Judgment

/s/ Melinda Harmon
Signature of Judicial Official

Melinda Harmon, U.S. District Judge
Name and Title of Judicial Officer

Defendant Organization's Mailing Address:

33 West Monroe Street
18th Floor
Chicago, IL 60603-5385

[October 21, 2002]
Date

AO 245E (3/96) Judgment in a Criminal Case for Organizational Defendants
Sheet 2—Probation

DEFENDANT ORGANIZATION: ARTHUR ANDERSEN LLP.
CASE NUMBER: 4:02CR00121-001

PROBATION

The Defendant organization is hereby placed on probation for a term of 5 years

This term consists of FIVE (5) YEARS probation as to Count 1.

The defendant organization shall not commit another federal, state or local crime.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant organization pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant organization shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant organization shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) within thirty days from the date of this judgment, the defendant organization shall designate an official of the organization to act as the organization's representative and be the primary contact with the probation officer;

2) the defendant organization shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

3) the defendant organization shall notify the probation officer ten days prior to any change in principal business or mailing address;

4) the defendant organization shall permit a probation officer to visit the organization at any of its operating business sites;

5) the defendant organization shall notify the probation officer within seventy-two (72) hours of any criminal prosecution, and within thirty (30) days of the filing of any major civil litigation, or administrative proceeding against the organization;

6) the defendant organization shall not dissolve, change its name, or change the name under which it does business unless this judgment and all criminal monetary penalties imposed by this court are either fully satisfied or are equally enforceable against the defendant's successors or assignees;

7) the defendant organization shall not waste, nor without permission of the probation officer, sell, assign, or transfer its assets, unless the judgment and all criminal monetary penalties imposed by this court are fully satisfied.

AO 245E (3/96) Judgment in a Criminal Case for Organizational Defendants
Sheet 2—Continued 1—Probation

Judgment—Page 3 of 5

DEFENDANT ORGANIZATION: ARTHUR ANDERSEN LLP.
CASE NUMBER: 4:02CR00121-001

SPECIAL CONDITIONS OF SUPERVISION

1) the defendant organization shall not associate with any persons or organizations engaged in criminal activity and shall not associate with any person or organization convicted of a felony unless granted permission to do so by the probation officer. This does not include associations with such persons or organizations as it pertains to the disposition of Andersen's legal matters.

2) the defendant organization must have a Court-approved compliance plan in effect at least ninety (90) days prior to re-entering the accounting/auditing business.

3) the defendant organization shall provide an annual report of its financial status including a copy of its U.S. income tax return to the probation officer.

4) as directed by the probation officer, the defendant organization shall notify third parties of risk that may be occasioned by the defendant organization's criminal record, and shall permit the probation officer to make such notification and to confirm the defendant organization's compliance with such notification requirement.

5) the defendant organization shall retain all documents and work papers as required by the Internal Revenue Service and professional auditing standards. Further, the defendant organization is to retain all documents and work papers related to any pending or threatened civil, criminal or regulatory litigation or investigation.

AO 245E (3/96) Judgment in a Criminal Case for Organizational Defendants
Sheet 3, Part A—Criminal Monetary Penalties

DEFENDANT ORGANIZATION: ARTHUR ANDERSEN LLP.
CASE NUMBER: 4:02CR00121-001

CRIMINAL MONETARY PENALTIES

The defendant organization shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 3, Part B.

	Assessment	Fine	Restitution
Totals:	$400	$500,000	

☐ If applicable, restitution amount ordered pursuant to plea agreement .....$ _____

FINE

The defendant organization shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the options on Sheet 3, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

☐ The court has determined that the defendant organization does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An amended judgment in a Criminal Case for Organization Defendants will be entered after such a determination.

☐ The defendant organization shall make restitution to the following payees in the amounts listed below.

If the defendant organization makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	

AO 245E (3/96) Judgment in a Criminal Case for Organizational Defendants
Sheet 3, Part B—Schedule of Payments

DEFENDANT ORGANIZATION: ARTHUR ANDERSEN LLP.
CASE NUMBER: 4:02CR00121-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☐ In full immediately; or

B X $ 500,400 * immediately, balance due (in accordance with C, D, or E); or

C ☐ Not later than _____; or

D ☐ in installments to commence ____ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection in the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ (*e.g., equal, weekly, monthly, quarterly*) installments of $_____ over a period of _____ year(s) to commence _____ days after the date of this judgment.

The defendant organization will be credited for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

* CRIMINAL MONETARY PENALTIES WERE PAID IN FULL ON OCTOBER 16, 2002.

☐ Joint and Several

☐ The defendant organization shall pay the cost of prosecution.

☐ The defendant organization shall forfeit the defendant organization's interest in the following property to the United States:

All criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[UNITED STATES COURTS]
[SOUTHERN DISTRICT OF TEXAS]
[FILED]
[JUN 15 2002]
[MICHAEL N. MILBY, CLERK OF COURT]

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO. H-02-121
vs.	)	
ARTHUR ANDERSEN, LLP	)	

SPECIAL VERDICT FORM

With respect to your verdict, did all twelve of you unanimously agree that the same Andersen agent acted with the required knowledge and intent? (Please check one)

X (Yes) _____ (No)

[June 15, 2002] Date

/s/ Oscar Criner Foreman of the Jury

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[CLERK, U.S. DISTRICT COURT]
[SOUTHERN DISTRICT OF TEXAS]
[FILED]
[[06/15/02]]
[MICHAEL N. MILBY, CLERK]
[BY DEPUTY /s/ H. Tippen]

UNITED STATES OF AMERICA	}	
	}	CRIMINAL NO. H-02-121
vs.	}	
ARTHUR ANDERSEN, LLP	}	

VERDICT OF THE JURY

We, the Jury in the above entitled cause, find the Defendant, Arthur Andersen, LLP, [Guilty]
(Guilty) (Not Guilty)
of the offense charged in the indictment.

[June 15, 2002]
Date

/s/ Oscar Criner
Foreman of the Jury

18 U.S.C. § 1503

§ 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

18 U.S.C. § 1505

§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with int nt to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1512
(2000 Version)

§ 1512. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is—

(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112; and

(B) in the case of an attempt, imprisonment for not more than twenty years.

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

(d) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(e) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(f) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(g) There is extraterritorial Federal jurisdiction over an offense under this section.

(h) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(i) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

18 U.S.C. § 1512
(current version)

§ 1512. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to–

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112;

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person; imprisonment for not more than 20 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 10 years.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release,, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release,, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 1515

§ 1515. Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section—

(1) the term "official proceeding" means—

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(B) a proceeding before the Congress;

(C) a proceeding before a Federal Government agency which is authorized by law; or

(D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

(2) the term "physical force" means physical action against another, and includes confinement;

(3) the term "misleading conduct" means—

(A) knowingly making a false statement;

(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(E) knowingly using a trick, scheme, or device with intent to mislead;

(4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant—

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

(B) serving as a probation or pretrial services officer under this title;

(5) the term "bodily injury" means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary; and

(6) the term "corruptly persuades" does not include conduct which would be misleading conduct but for a lack of a state of mind.

(b) As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

(c) This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.

(3)

Supreme Court, U.S.
FILED
DEC 8 - 2004
OFFICE OF THE CLERK

No. 04-368

In the Supreme Court of the United States

ARTHUR ANDERSEN LLP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

ELIZABETH D. COLLERY
Attorney

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Washington, D.C. 20530-0001
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QUESTIONS PRESENTED

1. Whether the jury instructions correctly defined the term "corruptly persuades" in 18 U.S.C. 1512(b)(2)(A) and (B) to mean to persuade with an improper purpose to subvert, undermine, or impede the fact-finding ability of an official proceeding.

2. Whether petitioner's conviction for corruptly persuading another to destroy evidence in violation of Section 1512(b)(2)(A) and (B) required proof that petitioner knew its conduct was wrongful.

3. Whether the district court plainly erred in failing to instruct the jury that a conviction under Section 1512(b)(2)(A) and (B) required proof that petitioner intended to obstruct a future government investigation it viewed as likely.

4. Whether the court of appeals erred in concluding that, even if Section 1512(b)(2)(A) and (B) required proof that petitioner intended to obstruct a particular official proceeding, the failure to give such an instruction here was harmless.

5. Whether petitioner preserved its argument that an informal SEC investigation is not an "official proceeding" under 18 U.S.C. 1515(a)(1)(C).

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In the Supreme Court of the United States

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ARTHUR ANDERSEN LLP, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 374 F.3d 281.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2004. The petition for a writ of certiorari was filed on September 14, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of corruptly persuading its employees to destroy documents with an intent to impair their availability in a United States

Securities and Exchange Commission (SEC) investigation, in violation of 18 U.S.C. 1512(b)(2)(A) and (B) (2000). Petitioner was sentenced to five years of probation, fined $500,000, and ordered to pay a special assessment of $400. The court of appeals affirmed. Pet. App. 1a-34a.

1. The trial evidence detailed the involvement of petitioner, an international auditing and consulting firm, and its client, the Enron Corporation, in an accounting debacle that left Enron in bankruptcy in a matter of weeks. The evidence showed that, to prevent Enron's and its own financial misdeeds and aggressive accounting from being uncovered by the SEC, petitioner instructed its employees to undertake an unprecedented campaign of document destruction.

At the time of Enron's collapse, petitioner was already in a precarious position with the SEC. In June 2001, the company settled an SEC action relating to its audit work for Waste Management Corporation, paying a record $7 million fine. The SEC "censure[d]" petitioner and entered a "cease and desist" order enjoining any future securities law violations, effectively placing petitioner under a form of "probation." Pet. App. 4a, 11a-12a; Tr. 1764-1765. In addition, in 1998, the SEC had issued an informal request, followed by a formal subpoena, for records relating to petitioner's audit work for Sunbeam Corporation. Tr. 448-455. In July 2001, the SEC filed an amended complaint against five Sunbeam officers and the lead Andersen partner who worked on the Sunbeam audit, contending that Sunbeam's financial statements were materially false or misleading. Pet. App. 4a, 11a; Tr. 458. Because of these two pre-existing matters, petitioner was very familiar with SEC enforcement proceedings and anxious to avoid any further sanction or censure. Gov't C.A. Br. 27.

Andersen audited the publicly-filed financial statements of Enron, a sophisticated trading and investment conglomerate with a global energy trading business. Pet. App. 3a. Enron

employed accounting practices that were highly aggressive, stretching Generally Accepted Accounting Principles (GAAP) to their outermost limits. *Ibid.*; Gov't C.A. Br. 6. Although petitioner knew of Enron's accounting practices and classified it as a "high risk" client, the two companies had an unusually close relationship. Pet. App. 3a; Tr. 1733-1734. David Duncan, who led Andersen's "Enron engagement team," was known as a strong "client advocate," and Andersen bent over backward to accommodate Enron, its largest domestic client. Gov't C.A. Br. 5. For example, when Enron disagreed with the advice it received from a top Andersen accountant, petitioner removed him, explaining that he was "not sufficiently on board with Enron's accounting attitude." Pet. App. 3a; Tr. 1173. Petitioner's Enron engagement team had more than 100 accountants and the firm billed Enron approximately $58 million in the year 2000. Pet. App. 3a.

In the late summer to early fall of 2001, petitioner's management uncovered serious accounting problems at Enron that caused it to anticipate imminent SEC action and civil litigation. First, in September 2001, high level Andersen personnel discovered that its Enron engagement team had approved the use of an improper accounting technique for four Raptors, a group of special purpose entities (SPEs) that Enron used to engage in "off balance sheet" activities. Pet. App. 3a-4a; Gov't C.A. Br. 6. To conceal the fact that some of the Raptors had experienced sharp losses, petitioner allowed Enron to aggregate the four entities even though petitioner's own accounting experts (the Professional Standards Group) deemed that technique a "black and white" violation of GAAP. Pet. App. 4a; Gov't C.A. Br. 7; Tr. 2290-2291. Second, while examining the Raptor issue, petitioner also determined that Enron and petitioner had made a separate $1.2 billion accounting error in Enron's favor, which would require, at a minimum, that Enron reduce its outstanding

shareholder equity by $1.2 billion in its quarterly SEC filing, due to be announced in mid-October 2001. Pet. App. 6a; Gov't C.A. Br. 7-8.

While Andersen's senior management pondered these accounting issues with rising concern, the public's awareness of Enron's problems was also growing. On August 14, 2001, Jeffrey Skilling, Enron's Chief Executive Officer, resigned unexpectedly, causing widespread speculation about financial problems at Enron and further depressing the already diminished value of Enron's stock. Pet. App. 4a; Gov't C.A. Br. 8. On August 28, 2001, after a Wall Street Journal article suggested improprieties at Enron, the SEC opened an informal investigation of the company. Tr. 656.

In late September, petitioner began to prepare for legal action (including SEC document requests) relating to Enron. By September 28, 2001, in-house attorney Nancy Temple was participating in near-daily meetings or conference calls with an Enron crisis-response group composed of high-level Andersen partners. Pet. App. 4a; Gov't C.A. Br. 9. On October 8, petitioner contacted a litigation partner at the law firm of Davis, Polk & Wardwell to secure representation in Enron-related litigation. Pet. App. 5a; Gov't C.A. Br. 10. The next day, Temple discussed the Enron situation with senior Andersen in-house attorneys. Her meeting notes document Temple's understanding that "some SEC investigation" was "highly probable"; that even if petitioner's accounting experts adopted an alternative methodology concerning the Raptors, there was a "reasonable possibility [that this] will force a restatement"; and that, absent an agreement by those experts, there would be a "restatement and probability of charge of violating cease and desist [order] in Waste Management." Gov't C.A. Br. 10; see Pet. App. 5a.

Concerned about the record that the SEC and private litigants would uncover, Temple and others decided to use the firm's widely ignored document policy to purge harmful ma-

terial from its files. In broad outline, petitioner's document policy required that only information necessary to support the firm's final audit opinion be maintained in the audit-"workpapers." All other information (including draft documents and handwritten notes) was to be permanently destroyed upon conclusion of an audit. Gov't C.A. Br. 11.

On October 10, as a result of conference call discussions with the Enron crisis team, Michael Odom, a Houston partner, urged Andersen personnel (including many members of the Enron engagement team) to comply with the document policy. Odom explained that "if it's destroyed in the course of the normal policy and litigation is filed the next day, that's great . . . we've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable." Pet. App. 5a; Gov't C.A. Br. 13.

Two days later, aware that the Enron engagement team had not been following the Andersen document policy, Temple urged that it be implemented immediately. Minutes after designating the Enron matter as a "government regulatory investigation" in the firm's computer system, Temple e-mailed Odom suggesting that he "remind[ ] the engagement team of our documentation and retention policy" and noting that compliance with the policy "will be helpful." Gov't C.A. Br. 14. Temple urged that the Enron engagement team comply with the policy even though it actually provided that "in cases of threatened litigation, no related information will be destroyed" and identified "regulatory agency investigations (*e.g.*, by the SEC)" as situations where "material in our files cannot be altered or deleted." GX 160A. Odom forwarded Temple's e-mail to Duncan. Pet. App. 5a.

On October 16, 2001, Enron issued a press release announcing a $1.01 billion charge to earnings. During a conference call with analysts later the same day, Ken Lay, Enron's Chief Executive Officer, mentioned that Enron was reducing

"shareholder equity" by approximately $1.2 billion.[1] Pet. App. 5a; Gov't C.A. Br. 16. Those announcements engendered intense negative publicity. *Ibid.* The SEC notified Enron by letter of its existing investigation and requested various accounting information and documents. Pet. App. 6a. Petitioner received a copy of the SEC letter from Enron on October 19. *Ibid.*; Gov't C.A. Br. 17.

Faced with those ominous developments, Temple again ordered compliance with the firm's document policy. On October 19, Temple e-mailed a link to the policy to Professional Standards Group accountant John Stewart, thereby causing Professional Standards Group accountants to delete hundreds of Enron-related e-mails. Likewise, during an urgent conference call on October 20 to discuss the SEC inquiry, Temple twice instructed members of petitioner's Enron crisis management team to "[m]ake sure to follow the [document] policy." Pet. App. 6a; Gov't C.A. Br. 17-18.

On October 23, Enron held another conference call with securities analysts, during which Lay declined to answer certain questions because of "potential lawsuits, as well as the SEC inquiry." Tr. 1876, 1878-1879. By that time, Duncan had concluded that the $1.2 billion accounting error would require a restatement. Tr. 1846-1850. After Lay's October 16 conference call with the analysts, Duncan and the other Enron engagement partners decided that compliance with the previously ignored document policy was imperative. At an "urgent" and "mandatory" meeting, Duncan directed the entire Enron engagement team to comply with the

[1] Lay's press release characterized the charge to earnings as "non-recurring," even though petitioner had informed Enron that that term was misleading. When Enron refused to delete the word, Temple requested that a draft Andersen internal memo regarding the matter be revised to delete any reference to Andersen's conclusion that the press release was "misleading." Pet. App. 5a-6a; Gov't C.A. Br. 14-15.

policy. Pet. App. 6a; Gov't C.A. Br. 18. Duncan knew when he issued the order that the SEC had already requested documents from Enron, and he acted out of concern that "extraneous material" in petitioner's files could be used against it in civil lawsuits and the SEC investigation. Tr. 1887-1888; Gov't C.A. Br. 18-19.

Petitioner's Enron auditors were instructed to make compliance with the document policy a priority despite the mounting time pressure they faced in dealing with Enron's accounting problems. As a result, the Enron engagement team made an unprecedented effort to destroy non-workpaper documents. Documents were shredded on-site and also were shipped to petitioner's main office for bulk shredding. A chart showing the quantity of materials shipped for shredding during 2001 reveals the extraordinary spike in physical document destruction that coincided with petitioner's discovery of the SEC inquiry. Pet. App. 6a. In addition to the destruction of hard copies of documents, tens of thousands of e-mails and other electronic documents were deleted, representing at least a three-fold increase over usual activity. Gov't C.A. Br. 19-20.

Although petitioner and its legal department recognized over the next two weeks that an SEC subpoena was inevitable, the company continued to shred Enron documents. The shredding continued notwithstanding an October 30 letter to Enron signed by two top SEC Enforcement Division officials, a fact that signified the SEC's "unusual" level of concern; petitioner's discovery of two additional major accounting problems—one involving suspected fraud by Enron relating to an entity named "Chewco" and the other a large accounting error by petitioner itself; the decision by Enron's Board of Directors to form a special committee to investigate Enron's accounting; the efforts of Andersen partners to help Enron's Board formulate strategy for dealing with the SEC and restating its finances; the filing of numerous shareholder

lawsuits; and petitioner's receipt of a subpoena for Enron documents from a private plaintiff. Gov't C.A. Br. 21-23; Tr. 1372, 5974-5975. Although Duncan and Temple were both warned during this period about the dangers of destroying documents, neither took any action to stop the shredding campaign they had unleashed. Gov't C.A. Br. 23-24.[2]

Petitioner did not stop shredding until November 9, the day after the SEC served petitioner's general counsel in Chicago with a subpoena for its Enron documents, and Enron announced its intent to file a restatement. Only then did Duncan's assistant send the engagement team an e-mail entitled "Stop the Shredding," which explained that "[w]e have been officially served for our documents." Pet. App. 6a-7a; Gov't C.A. Br. 24.

Enron filed for bankruptcy on December 2, 2001. In April 2002, Duncan pleaded guilty to obstructing the SEC investigation. Gov't C.A. Br. 24.

2. On March 7, 2002, petitioner was indicted in the United States District Court for the Southern District of Texas on one count of corruptly persuading its personnel to withhold, alter, destroy, or conceal documents with the intent to impair their availability in an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B).[3]

[2] On October 26, 2001, Andersen partner John Riley heard the sound of shredders operating in the Houston office and warned Duncan that "this wouldn't be the best time in the world for you guys to be shredding a bunch of stuff." Tr. 5901. Duncan agreed that the "worst-case scenario" in a "situation like this" would be "people * * * destroying a lot of documents," but then took no action. Tr. 5900-5901. Six days later, David Stulb, another Andersen partner, saw Duncan attempting to discard a document Duncan described to him as "another smoking gun." Tr. 3667. Stulb warned Duncan of the need to retain "all of this information" because of the "strong likelihood" that, *inter alia*, the SEC and other bodies would be interested. Tr. 3667. Stulb also informed Nancy Temple that Duncan needed guidance on document retention. Temple promised to take care of the matter and then did nothing. Tr. 3668-3674.

At the close of trial, the court instructed the jury about the statutory term "corruptly persuades" in Section 1512(b), stating: "The word 'corruptly' means having an improper purpose. An improper purpose for this case is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." Pet. App. 48a-49a. The court also informed the jury that

> it is not necessary for the Government to prove that [petitioner] knew its conduct violated the criminal law. Thus, even if [petitioner] honestly and sincerely believed that its conduct was lawful, you may find [petitioner] guilty if you conclude that [petitioner] acted corruptly and with the intent to make documents unavailable for an official proceeding.

[3] 18 U.S.C. 1512(b)(2)(A) and (B) (2000) provide that

> [w]hoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to
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> * * * * *
>
> (2) cause or induce any person to —
>
> (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding; [or]
>
> (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding * * *
>
> shall be fined under this title or imprisoned not more than ten years, or both.

Section 1512 has been amended twice since petitioner's offense and conviction, but the language of Section 1512(b) is unaltered. All references in this brief to Section 1512 are to former Section 1512, unless otherwise specified.

Id. at 49a. The court's instructions defined the term "official proceeding" as "a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served." *Ibid.*[4] The jury returned a guilty verdict.

3. The court of appeals affirmed. Pet. App. 1a-34a. The court concluded, *inter alia*, that the jury instructions correctly defined the statutory term "corruptly" to mean acting with an "improper purpose" "to subvert, undermine, or impede the fact-finding ability of an official proceeding." *Id.* at 17a-25a. The court noted that the jury instructions accorded with the way in which the term "corruptly" had been routinely defined in related obstruction of justice statutes and with how a majority of circuits interpreted the term in Section 1512(b). *Id.* at 18a. The court rejected the contention that the instruction rendered the term "corruptly" superfluous. While Section 1512(b)(2)(B) separately requires that the defendant act with an "intent to impair the * * * integrity or availability [of an object] for use in an official proceeding," the court explained that an intent to "subvert," "undermine," or "impede" an investigation, "implies a degree of personal culpability beyond a mere intent to make documents unavailable." *Id.* at 22a. Likewise, the court noted that the statute's legislative history supported the district court's interpretation. As originally drafted, Section 1512(b) applied only to coercive conduct (*i.e.*, intimidation, physical force or threats, or misleading conduct). In adding the term "corruptly," which had long been defined as used in Section 1503 to mean "motivated by an improper purpose," Congress indicated that it wanted to "include in section 1512 the same

[4] Contrary to petitioner's claim (Pet. 4), the court did not instruct the jury that "the Government did not have to prove that the 'corrupt persuader' had any particular proceeding in mind or knew that a future subpoena was likely."

protection of witnesses from non-coercive influence that was (and is) found in section 1503." *Id.* at 23a. Accordingly, the Fifth Circuit concluded, since "§ 1503 proscribed conduct undertaken 'with an improper purpose,' § 1512(b) should also do so." *Ibid.*

The court of appeals also concluded that an alternative instruction proposed by petitioner was not substantially correct. The court noted that petitioner's proposed instruction, which stated that a defendant acts "corruptly" only when he uses an improper means of persuasion or causes another to violate an independent legal duty, had no support in the statute or existing law. Pet. App. 23a. And, the court concluded, any error in failing to give petitioner's instruction was harmless, because the instruction actually given, like petitioner's proposed instruction, already required the jury to find a level of culpability—an "intent to subvert, undermine, or impede"—over and above a mere intent to follow a document retention policy that would result in making a document unavailable in an official proceeding. *Id.* at 24a-25a. Likewise, the court rejected petitioner's claim that Section 1512(b)(2) requires proof that the defendant knew his conduct was unlawful, noting the "general rule * * * that ignorance of the law is no defense." *Id.* at 29a.

The court of appeals also concluded that the district court correctly refused petitioner's request to instruct the jury that the official proceeding that petitioner intended to obstruct must have been "ongoing * * * or scheduled to be commenced in the future." Petitioner grounded that request in language from *United States* v. *Shively*, 927 F.2d 804, 813 (5th Cir.), cert. denied, 501 U.S. 1209 (1991), but the court found that language to be *dicta* that "defies the statutory provision that an official proceeding 'need not be pending or about to be instituted at the time of the offense.'" Pet. App. 26a (quoting 18 U.S.C. 1512(e)(1)).

Similarly, the court of appeals found no reversible error in the district court's failure to instruct the jury that petitioner could be found guilty only if it sought to obstruct a "particular proceeding." Pet. App. 26a-27a. Once again the court found that petitioner's proposed instruction "ignores the statutory language, which does not require a defendant to know that the proceeding is pending or about to be initiated." *Id.* at 27a. The court also rejected petitioner's claim that such an instruction was needed to prevent petitioner's conviction for innocent maintenance of a records program. The court found that no such risk existed here because "[t]his case was tried on the theory that [petitioner] intended to undermine, subvert, or impede a proceeding of the SEC," not under the theory that a mere "records retention program violated the Act." *Ibid.* Accordingly, the court concluded, "[t]here was no risk of conviction for innocent maintenance of a records program." *Id.* at 28a.

ARGUMENT

Although petitioner identifies only one question presented, *i.e.*, whether the jury instructions misinterpreted the elements of the offense created by 18 U.S.C. 1512(b)(2)(A) and (B) (Pet. I), the petition discusses five separate issues of statutory interpretation under that provision. Two of those issues were not raised or preserved below, and none of the issues merits certiorari review.

1. a. Petitioner asks this Court to address the meaning of "corruptly persuades" under Section 1512(b), warning that the Fifth Circuit's "enormously influential" decision "pos[es] serious risks of prosecution for virtually every company that maintains a document retention policy." Pet. 13.[5] In fact,

[5] Contrary to petitioner's claims (Pet. 11-12), this case does not involve the validity of "a hundred years" of precedent on "obstruction of justice." It concerns the meaning of a particular criminal statute, 18 U.S.C. 1512(b), which was enacted in 1982 and amended in 1988 to add the "corruptly persuades" element that petitioner challenges.

the decision below will have little future impact in prosecutions for document destruction, because Congress recently adopted a new criminal provision addressing such conduct. 18 U.S.C. 1519, enacted as part of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, Tit. VII, § 802(a), 116 Stat. 800, prohibits, *inter alia*, the knowing destruction of documents "in relation to or contemplation of" "any matter within the jurisdiction of any department or agency of the United States." Section 1519 also contains a greater maximum term of imprisonment (20 years) than Section 1512(b)(2) (ten years). Most federal prosecutors will henceforth use Section 1519—which does not require proof that the defendant engaged in "corrupt persua[sion]"—to prosecute document destruction cases, including cases in which the defendant persuaded or otherwise caused or aided and abetted subordinates to destroy documents, as here. The question presented in this case—whether document destruction cases like this one may also be prosecuted under Section 1512(b)(2)—is thus of little continuing practical importance.[6]

b. Even absent the new statute, the meaning of "corruptly persuades" in Section 1512(b) would not warrant further review. Despite petitioner's frequent resort to due process rhetoric (Pet. 12, 15, 18, 23, 26, 28), petitioner has never claimed that Section 1512(b) denied it due process by failing to provide fair warning that its conduct was unlawful. The

[6] With respect to the specific issue of accountants' papers, the Sarbanes-Oxley Act also added 18 U.S.C. 1520, which requires the maintenance of "all audit or review workpapers" for five years, 18 U.S.C. 1520(a)(1), and the promulgation by the SEC of further requirements for the "retention of relevant records," 18 U.S.C. 1520(a)(2). Violation of the statutory or SEC requirements is a criminal offense, 18 U.S.C. 1520(b), and future cases involving destruction of accountants' papers could also be brought under that provision.

reason for that omission is clear. At the time of petitioner's document destruction campaign, federal law gave ample notice that persuading others to destroy evidence to thwart an impending federal investigation was a crime, *United States* v. *Shotts*, 145 F.3d 1289, 1300-1301 (11th Cir. 1998), cert. denied, 525 U.S. 117 (1999); *United States* v. *Thompson*, 76 F.3d 442, 452 (2d Cir. 1996), and that companies were not free to destroy documents so long as a subpoena had not yet arrived, *United States* v. *Gravely*, 840 F.2d 1156, 1160-1161 (4th Cir. 1988).

Accordingly, petitioner has preserved only a statutory claim that the phrase "corruptly persuades," as used in Section 1512(b)(2), requires proof that it used improper means of persuasion or that it persuaded its employees to commit unlawful acts. The lower courts correctly rejected that claim. Congress borrowed the word "corruptly" in Section 1512(b)(2) from a related obstruction of justice statute, 18 U.S.C. 1503, where it has long been understood to mean conduct motivated by an improper purpose. *Thompson*, 76 F.3d at 452 (citing cases); *United States* v. *Haas*, 583 F.2d 216, 220 (5th Cir. 1978), cert. denied, 440 U.S. 981 (1979).[7] The majority of courts of appeals that have considered the meaning of "corruptly" in Section 1512(b) have therefore accorded it the same meaning. *Shotts*, 145 F.3d at 1300-1301 (holding that "corruptly" means "motivated by an improper purpose"); *United States* v. *Khatami*, 280 F.3d 907, 911 (9th Cir. 2002) ("[O]ne who attempts to 'corruptly persuade' another is, given the pejorative plain meaning of the root adjective 'corrupt,' motivated by an inappropriate or improper purpose to convince another to engage in a course of behavior."), cert. denied, 535 U.S. 1068 (2002); see also *United States* v. *Brady*, 168 F.3d 574, 578-579 & n.3 (1st Cir. 1999) (suggesting that "corruptly" in Section 1512 is satisfied by proof of an improper motive of obstructing justice).

The prevailing view of the meaning of the term "corruptly" in obstruction statutes finds strong support in the legislative history of Section 1512. Before 1982, Section 1503 prohibited corrupt or coercive efforts to influence witnesses, jurors, and court officials in its first clause; its second so-called "omnibus clause" in relevant part criminalized the conduct of anyone who "corruptly * * * endeavors to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. 1503 (1976).

Because, as noted above, the term "corruptly" was interpreted to mean for an "improper motive or with bad or evil or wicked purpose," *United States* v. *Partin*, 552 F.2d 621, 642 (5th Cir.), cert. denied, 434 U.S. 903 (1977); see *Thompson*, 76 F.3d at 452, Section 1503 encompassed non-coercive, non-deceptive acts of witness tampering, such as urging a witness to testify falsely or to refrain from testifying or to destroy evidence. See, *e.g.*, *United States* v. *Jackson*, 607 F.2d 1219, 1223 (8th Cir. 1979), cert. denied, 444 U.S. 1080 (1980); *United States* v. *Howard*, 569 F.2d 1331, 1334, 1337 & n.9 (5th Cir.), cert. denied, 439 U.S. 834 (1978). Section 1512 was enacted as part of the Victim Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 4(a), 96 Stat. 1248, which was intended to broaden protections for witnesses. The VWPA deleted the protection for witnesses from the first clause of Section 1503, left the omnibus clause of Section 1503 intact, and enacted Section 1512, but without the "cor-

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[7] The use of "corruptly" in the new Section 1512(c), which was added in 2002, see Pub. L. No. 107-204, § 1102, 116 Stat. 745, likewise mirrors the use of that term in another obstruction of justice statute, 18 U.S.C. 1505 (prohibiting "corruptly * * * influenc[ing], obstruct[ing], or imped[ing]" pending agency proceedings or congressional investigations). There is no dispute that "corruptly" in Section 1505 encompasses acting with an improper purpose. See 18 U.S.C. 1515(b) ("As used in section 1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement."); see p. 21, *infra*.

rupt persuasion" element. Thus, as originally enacted, what became Section 1512(b) was limited to coercive or deceptive conduct; it prohibited only the knowing use of intimidation, force, threats, or misleading conduct with the requisite intent to, for example, influence the testimony of a person in an official proceeding, and did not cover non-coercive, non-deceptive witness tampering—conduct that was previously covered by Section 1503. See *United States* v. *Tackett*, 113 F.3d 603, 608-609 (6th Cir. 1997), cert. denied, 522 U.S. 1089 (1998).

The statutory changes led to a circuit split. While a majority of the courts of appeals to address the issue continued to uphold prosecutions of non-coercive witness tampering under the omnibus clause of Section 1503, see *Tackett*, 113 F.3d at 607 (citing cases), the Second Circuit refused to allow conviction under Section 1503 of a defendant who asked a witness to lie to the grand jury, reasoning that Congress meant Section 1512 to be the exclusive vehicle for prosecuting witness tampering. *United States* v. *Hernandez*, 730 F.2d 895 (2d Cir. 1984).

In response, Congress amended Section 1512 to add "corruptly persuades" to the list of prohibited conduct. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(a) and (c), 102 Stat. 4181. The section-by-section analysis of the legislation described "corrupt persuasion" broadly to include conduct that requires neither illegal means of persuasion nor persuasion to violate a legal duty. See 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988) ("'Corrupt persuasion' of a witness is a non-coercive attempt to induce a witness to become unavailable to testify.").[8] Moreover, the section-by-

[8] Convincing a witness to destroy documents is no less culpable than convincing him to become unavailable to testify. Indeed, the latter can be less damaging, since a missing witness can be located while a destroyed document is gone forever.

section analysis explained that the amendment was intended "merely to include in section 1512 *the same protection of witnesses from non-coercive influence that was (and is) found in section 1503*." *Ibid.* (emphasis added).[9] Because the term "corruptly" in Section 1503 had long been defined to mean "motivated by an improper purpose," "[i]t is reasonable to attribute to the 'corruptly persuades' language in Section 1512(b), the same well-established meaning." *Shotts*, 145 F.3d at 1301; see *United States* v. *Farrell*, 126 F.3d 484, 492 (3d Cir. 1997) (Campbell, J., dissenting).

c. Contrary to petitioner's claim (Pet. 22), the court of appeals' construction of Section 1512(b) does not render the word "corruptly" superfluous. The instructions here required the jury to find both that petitioner acted "corruptly," *i.e.*, with "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," Pet. App. 18a, and that it acted with an intent to withhold material from an official proceeding, *id.* at 47a. Those two intents are not the same. An Andersen employee could, for example, delete embarrassing personal e-mails from the company's computer system to prevent their disclosure in an SEC investigation without being motivated by a desire to subvert, undermine, or impede that investigation itself. Thus, as the Fifth Circuit observed, the terms "subvert," "undermine," and "impede" each "implies a degree of personal culpability beyond a mere intent to make documents unavailable." *Id.* at 22a.

Nor does the court of appeals' reading of "corruptly persuades" render the scheme of corruption of justice statutes

[9] Petitioner argues (Pet. 23 n.23) that Senator Biden's comments on the VWPA referred only to cases in which the "corrupt persuasion" involved "independently wrongful efforts to influence witnesses." See also Pet. 16-17. Senator Biden stated, however, that he was offering merely "[e]xamples" of "corrupt persuasion," not that he was purporting to give an exhaustive list of conduct that would fall under the amended Section 1512. 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988).

(as of 2001) "positively nonsensical." Pet. 22. Petitioner notes (Pet. 1-2, 15, 26) that, at the time of the charged conduct, it was illegal to persuade someone else to destroy documents to thwart an anticipated federal proceeding but not illegal to destroy documents one's self. That apparent statutory omission has little relevance here, because petitioner's own document destruction largely took place *after* it knew of the SEC's informal investigation—*i.e.*, at a time when it was unlawful under 18 U.S.C. 1505 for petitioner itself to destroy the documents. See p. 29, *infra*. Nor is the distinction between acting alone and acting in concert with others "nonsensical."[10] Indeed, it is petitioner's own interpretation of Section 1512(b) that would inject a large dose of incongruity into the obstruction statutes by making the word "corruptly" mean one thing in Section 1512(b) and something entirely different in Sections 1503, 1512(c), and 1515. In any event, insofar as there was a statutory gap in 2001, Congress closed the claimed loophole in 2002 by enacting Section 1512(c), which prohibits individuals from "corruptly" destroying documents on their own "with the intent to impair the object's * * * availability for use in an official proceeding," and Section 1519, which prohibits the knowing destruction of documents "in relation to or contemplation of" "any matter within the jurisdiction of any department or agency of the United States." Further review is not warranted to consider the correct interpretation of Section

[10] It is, for example, illegal to conspire with another to commit a future crime but not illegal to formulate an intent to commit a crime on one's own. Moreover, the facts of this case illustrate the dangers of concerted action. On his own, David Duncan destroyed a few boxes of documents, while collectively the Enron engagement team destroyed nearly two tons of paper and tens of thousands of e-mails. Pet. App. 6a; Gov't C.A. Br. 4.

1512(b)(2) in light of a purported statutory gap that no longer exists.[11]

d. Petitioner errs in contending (Pet. 18-21) that the decision below conflicts with decisions from the Third and D.C. Circuits.

In *Farrell*, *supra*, the defendant was convicted under Section 1512(b)(3) of "corrupt persuasion" after he urged a coconspirator not to reveal to federal agents self-incriminating information about their joint criminal activities. 126 F.3d. at 486-487. The Third Circuit's decision reversing the conviction was a limited one. The court held that "the 'culpable conduct' that violates § 1512(b)(3)'s corruptly persuades clause does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self- incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators." *Id.* at 488. Beyond that specific holding that "corruptly persuades" does not include persuading an individual to assert a valid constitutional privilege, the court stated that it was "hesitant to define in more abstract terms the boundaries of the conduct punishable under the somewhat ambiguous 'corruptly persuades' clause. * * * [W]e do not think it necessary to provide such a definition here." *Ibid.* Moreover, although the court opined that the term "corrupt" must mean something more than simply an "improper purpose," it specifically left open the question whether persuading a person to withhold information from

[11] Contrary to petitioner's claim (Pet. 12, 23), the court of appeals' interpretation of Section 1512(b)(2) does not violate the rule of lenity. The rule of lenity "applies only if, after seizing everything from which aid can be derived, . . . [the court] can make no more than a guess as to what Congress intended." *United States* v. *Wells*, 519 U.S. 482, 499 (1997) (citations and internal quotation marks omitted). As explained above, the language, structure, and legislative history of Section 1512(b)(2) make Congress's intent clear.

federal investigators absent a valid Fifth Amendment privilege to do so would be covered by Section 1512(b)'s "corruptly persuades" clause. *Id.* at 489 n.3. Thus, as the Fifth Circuit correctly concluded (Pet. App. 21a, 23a), *Farrell* did not address the issue presented here.[12]

Moreover, since *Farrell*, the Third Circuit has not clearly resolved how the term "corruptly" applies under Section 1512(b) to cases that do not involve the assertion of a Fifth Amendment privilege. In *United States* v. *Davis*, 183 F.3d 231 (3d Cir. 1999), the court appeared to rely (without any further analysis) on *Farrell*'s *dicta* that "corrupt" conduct requires more than an "improper purpose." But a few months later, in *United States* v. *Applewhaite*, 195 F.3d 679, 688 (1999), the Third Circuit affirmed a conviction under Section 1512(b)(2) for "corrupt" behavior where the defendants, without using any unlawful means, persuaded an unsuspecting third party to destroy evidence of a crime.[13] Read as a whole, therefore, Third Circuit law provides no clear guidance on the question decided below.

Petitioner's claim (Pet. 18-19) that the decision below conflicts with *United States* v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), cert. denied, 506 U.S. 1021 (1992), and *United States* v. *Morrison*, 98 F.3d 619 (D.C. Cir. 1996), cert. denied,

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[12] Notwithstanding a claimed conflict with *Farrell*, this Court denied certiorari in *United States* v. *Shotts*, 145 F.3d 1289 (11th Cir. 1998), cert. denied, 525 U.S. 1177 (1999) (No. 98-837), and *United States* v. *O'Kane*, 86 Fed. Appx. 447 (2d Cir.), cert. denied, 125 S. Ct. 38 (2004) (No. 03-10010), two cases factually more similar to *Farrell* than this one.

[13] Petitioner attempts to distinguish *Applewhaite* on the ground that the defendants there knew that a crime had been committed. Pet. 25. That fact is irrelevant. Section 1512(b)(2) is not limited to persons who act to destroy evidence of their own crimes. Moreover, as noted above, during the period when most of the documents were destroyed, petitioner knew that the SEC was investigating Enron, and its decision to destroy documents was thus itself a crime under 15 U.S.C. 1505.

520 U.S. 1131 (1997), is likewise incorrect. In *Poindexter*, the D.C. Circuit concluded that the phrase "corruptly influences" in Section 1505 was unconstitutionally vague as applied to the conduct of lying to Congress. The court also suggested that narrowing the term "corruptly" to mean influencing another person to violate his legal duty might eliminate that problem. 951 F.2d at 379. The statute at issue in *Poindexter* was Section 1505, and the decision expressly distinguished Section 1503, the statute on which Section 1512(b) was modeled, stating that "the language of § 1505 is materially different from that of § 1503." *Id.* at 385. Moreover, as noted above, petitioner has never suggested that Section 1512(b)(2)(A) and (B) is unconstitutionally vague, either on its face or as applied, and the *Poindexter* court's perceived need to interpret Section 1505 to avoid unconstitutional vagueness accordingly does not apply here. In any event, after *Poindexter*, Congress quickly rejected the D.C. Circuit's "nonsensical interpretation of section 1505," 142 Cong. Rec. S11,605, S11,608 (daily ed. Sept. 27, 1996) (statement of Sen. Nickles), by providing:

> As used in section 1505, the term "*corruptly*" *means acting with an improper purpose*, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

18 U.S.C. 1515(b) (emphasis added). Thus, to the extent it is relevant at all, *Poindexter* and the ensuing events provide further evidence of Congress's intent that, in the context of the obstruction of justice statutes, "corruptly" should mean acting with an improper purpose.

Morrison likewise does not conflict with the decision below. In *Morrison*, a defendant who exhorted a witness to testify falsely in his favor was convicted of corrupt persuasion under Section 1512(b). On appeal, Morrison argued that

his conduct was not "corrupt" under *Poindexter* because he did not use any improper means of persuasion. In affirming, the D.C. Circuit suggested in passing that *Poindexter*'s reasoning might also be applied to Section 1512, but the court did not decide that question because, even assuming that *Poindexter* did apply, Morrison had acted "corruptly" by attempting to convince a witness to "violate her legal duty to testify truthfully in court." 98 F.3d at 630. The holding of *Morrison*, *i.e.*, that the defendant's conduct was "corrupt," does not conflict with the decision below.

2. a. Petitioner contends (Pet. 26) that the "corruptly persuades" prong of Section 1512(b)(2) requires proof that the defendant knew his actions were wrongful. As the Fifth Circuit noted, Pet. App. 28a-29a, it is a "venerable principle that ignorance of the law generally is no defense to a criminal charge." *Ratzlaf* v. *United States*, 510 U.S. 135, 149 (1994). In *Pettibone* v. *United States*, 148 U.S. 197, 205 (1893), this Court applied that principle to a predecessor of 1503 that prohibited "corruptly * * * obstruct[ing] or impeded[ing], or endeavor[ing] to obstruct or impede, the due administration of justice [in a United States Court]." *Id.* at 197. Since that time, no court has interpreted the word "corruptly" in an obstruction of justice statute to require proof that the defendant knew his conduct was unlawful. See, *e.g.*, *United States* v. *Mullins*, 22 F.3d 1365, 1369 (6th Cir. 1994); *Poindexter*, 951 F.2d at 379.

b. Contrary to petitioner's claim (Pet. 27) the Fifth Circuit's application of that settled law does not conflict with *Ratzlaf*, *supra*, or *Bryan* v. *United States*, 524 U.S. 184 (1998). In *Ratzlaf*, this Court concluded that, as used in a provision that prohibited the structuring of cash transactions to evade reporting requirements, the term "willfully" required proof that the defendant knew his conduct was unlawful. 510 U.S. at 136-137. Unlike "corruptly," the term "willfully" has long been understood in certain contexts to

require proof of a knowing violation of a legal duty. See, *e.g.*, *Cheek* v. *United States*, 498 U.S. 192, 200-201 (1991). Moreover, the *Ratzlaf* Court adopted its interpretation to ensure that the statute's "willfulness" requirement would have a consistent meaning in several related provisions in the same subchapter. 510 U.S. at 142-143. Petitioner's interpretation, by contrast, would assign a different meaning to the term "corruptly" in Section 1512(b) than it carries in the related obstruction statues, an undesirable result at odds with the rationale of *Ratzlaf*.

Bryan, *supra*, which also interprets the statutory term "willfully," is likewise unhelpful to petitioner. In *Bryan*, the Court held that a conviction for willfully violating the statute prohibiting dealing in firearms without a license required proof only that a defendant knew that his conduct was unlawful and not that he was aware of the licensing requirement. 524 U.S. at 194-195. Nothing in *Bryan* undermines the consistent holding of the courts that there is no similar requirement in the obstruction statutes, nor does *Bryan* provide any support for imposing petitioner's proposed alternative requirement (Pet. 26) that the jury must find that a Section 1512 defendant had a "basic consciousness of wrongdoing."[14] In any event, the jury was required to find such a "basic consciousness of wrongdoing" in this case when it was instructed (Pet. App. 48a) that it had to find that the

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[14] Petitioner mischaracterizes *United States* v. *Aguilar*, 515 U.S. 593, 602 (1995), as holding that "an intent to obstruct justice is not in itself obviously wrongful" (Pet. 27). In *Aguilar*, where the Court merely stated that proof of an intent to obstruct justice, coupled with *any* act at all in furtherance of that intent, is not alone sufficient to impose criminal liability under 18 U.S.C. 1503. The court of appeals' decision in this case, by contrast, stands for the proposition that an intent to "subvert, undermine, or impede" a proceeding, coupled with the conduct of knowingly persuading someone to destroy a document so that it will be unavailable for use in that proceeding, violates Section 1512(b)(2).

defendant acted "corruptly," with an "improper purpose" to "subvert, undermine, or impede the fact-finding ability of an official proceeding." See *Thompson*, 76 F.3d at 451.[15]

c. Nor does the court of appeals' decision conflict with *United States* v. *Frankhauser*, 80 F.3d 641 (1st Cir. 1996). See Pet. 27. In *Frankhauser*, the First Circuit noted that, as a result of a prior conviction for obstructing justice, the defendant knew that his advice to destroy some papers was illegal, thereby "establishing that he acted with corrupt intent to violate the law." 80 F.3d at 652. The First Circuit did not hold, however, that such proof was a prerequisite for a Section 1512(b)(2) proceeding, cautioning that "[e]ach case must be evaluated on its own facts." *Ibid.* *Frankhauser* therefore stands only for the proposition that, where it exists, proof that the defendant knew his conduct was unlawful will suffice to show a corrupt intent.

3. Petitioner suggests that the jury should have been instructed that petitioner could not be found guilty unless it anticipated that an SEC proceeding was "likely" or "probable." Pet. 27-29. Petitioner did not request such an instruction in the district court (Pet. 29 n.28) and did not argue in the court of appeals that the failure to give it was plain error.[16] Accordingly, petitioner's claim is not properly pre-

[15] Petitioner's claim (Pet. 1, 4, 7, 12) that no one at Andersen believed that it was wrong to destroy Enron documents is inaccurate. Both Temple and Duncan were on notice that such conduct was improper. See note 2, *supra*. In addition, when Andersen auditors in Portland, Oregon, received the urgent message from Houston to "clean up the files," a senior supervisor declined for the Portland team. Tr. 5158-5168. As that supervisor later expressed: "[I]f you think there is going to be some requirement to produce these documents, then don't destroy anything. For God's sake, just don't do that." Tr. 5210.

[16] Petitioner's capable trial counsel doubtless never requested such an instruction because the evidence so clearly demonstrated petitioner's awareness that an official proceeding was likely (or indeed had already

sented here. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks and citation omitted) (noting that this Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below"); see *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

Petitioner contends (Pet. 28) that a "likely or probable" instruction was required by *United States* v. *Aguilar*, 515 U.S. 593 (1995). In *Aguilar*, this Court held that the defendant could not be convicted of an offense under Section 1503, which specifically requires proof of a "pending proceeding," absent proof that the "natural and probable" consequence of his action was to interfere with a grand jury proceeding. *Id.*

begun) when its employees were instructed to destroy Enron documents. See GX NT-1009 (Nancy Temple's Oct. 9 Notes describe an SEC investigation as "highly probable"); Tr. 1887-1894 (Duncan instructs petitioner's Enron engagement team to destroy all non-working paper Enron documents two business days after learning of the SEC's preliminary investigation).

The record also belies petitioner's related claim (Pet. 7-9) that it did not view an SEC request for its own documents as "likely" until it definitely concluded that Enron would have to restate its earnings. In fact, Nancy Temple knew from studying the Waste Management and Sunbeam matters that the SEC might request documents from petitioner before a restatement was even filed. See GX NT Undated, at A-004609 (Temple's notes on Waste Management state "No restate until Feb. SEC all over us in Jan."), Tr. 6093-6096; Tr. 448-459 (SEC requests petitioner's Sunbeam documents months before a restatement is filed). Moreover, Duncan knew by October 23, 2002, that Enron's balance sheet would have to be restated and expected the SEC to investigate any restatements. Tr. 1849-1850, 1904-1905. And while Andersen partner John Riley claimed to have believed that the SEC would subpoena petitioner's records only if Enron restated its *income*, Tr. 6198, there is no evidence that Temple, Duncan, or the SEC shared this view. Riley's claim was also substantially impeached by his testimony during the Sunbeam matter, where he acknowledged knowing from the first sign of adverse publicity that petitioner was going to have a problem with an SEC investigation. Tr. 6120.

at 599. Although the petition for certiorari relies extensively on *Aguilar* (Pet. 12, 14-15, 22, 25, 26, 27, 28), petitioner never claimed in the district court that *Aguilar* applied to this prosecution, barely mentioned the case in its pre-trial motions, and then failed to cite it once in its opening appellate brief. Petitioner has therefore waived any claim that *Aguilar* applies to prosecutions under Section 1512.

4. Petitioner did request an instruction requiring the jury to find that it intended to obstruct a "particular" official proceeding that was "ongoing or scheduled to be commenced in the future." But the district court's decision not to give such an instruction does not warrant further review. As the Fifth Circuit observed, petitioner's claim that the proceeding must be "ongoing or scheduled" "defie[d] the statutory provision [18 U.S.C. 1512(e)(1)(2000)] that an official proceeding 'need not be pending or about to be instituted at the time of the offense.'" Pet. App. 26a. Lower courts accordingly have uniformly declined to impose such a requirement under Section 1512(b)(2). See *Frankhauser*, 80 F.3d at 652 ("an official proceeding need not be pending or about to be instituted at the time of the corrupt persuasion"); *United States* v. *Kelley*, 36 F.3d 1118, 1128 (D.C. Cir. 1994); *United States* v. *Conneaut Indus., Inc.*, 852 F. Supp. 116, 125 (D.R.I. 1994).

Nor does Section 1512(b)(2) require proof that petitioner anticipated a "particular" federal proceeding. The statute's language requires only that the defendant have acted with intent to obstruct "an official proceeding." See 18 U.S.C. 1512(b)(2)(A) and (B). Indeed, by specifying that an official proceeding need not be pending, see 18 U.S.C. 1512(e)(1) (2000), and that defendant need not know that the official proceeding is a federal one, see 18 U.S.C. 1512(f) (2000), Congress signaled that the defendant's knowledge about the proceeding need only be general, not particular. Furthermore, adoption of a "particular proceeding" limitation would create an absurd loophole, permitting a company that destroyed crucial documents after learning of an imminent federal investigation to escape conviction by claiming that it did not know the "particulars" of that investigation. Congress did not intend such a result.[17]

Even if a "particular proceeding" requirement were imported into Section 1512(b)(2)(A) and (B), petitioner's requested instruction would have been unnecessary because, as the Fifth Circuit found, "[t]his case was tried on the theory that petitioner intended to undermine, subvert, or impede a proceeding of the SEC," Pet. App. 27a, and it was "clear at every step" "[t]hat the SEC was the feared opponent and initiator of a proceeding and not some other shadowy opponent," *id.* at 28a. Because there was only one proceeding that the jury could have found petitioner intended to obstruct, any instructional error in this regard was harmless. *Ibid.*; see *Neder* v. *United States*, 527 U.S. 1, 7-15 (1999).[18]

Although petitioner suggests (Pet. 28-29) that the jury may have convicted it based solely on the adoption of a document retention policy, the record belies that claim. The indictment charged petitioner with a scheme to destroy Enron-related documents, and specified that the offense oc-

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[17] In *Frankhauser*, the First Circuit suggested that "the defendant must act knowingly and with the intent to impair an object's availability for use in a particular official proceeding." 80 F.3d at 651. At the same time, the court seemed to conclude that such proof was *not* required, affirming a conviction even though it was unclear which of two potential proceedings the defendant anticipated. See *id.* at 652 (finding the defendant "expected a grand jury investigation and/or a trial in the foreseeable future.").

[18] Petitioner itself contended below that "the evidence in the case suggests that the only proceeding that could have been affected is one involving the SEC." Tr. 6295; see R. 1125 (argument by petitioner that "the government's case against [petitioner] rests entirely on the theory that Andersen partners persuaded others to destroy documents with the intention of making them unavailable for use in an incipient SEC proceeding").

curred at a time long after petitioner's document retention policy was adopted. The government's trial evidence proved the same scheme to destroy Enron-related documents that was alleged in the indictment. And the government specifically informed the jury in closing argument that "there's nothing criminal about having a document policy. What is a crime is to take it out, blow it off, and implement it in the middle of an SEC investigation because you want to be able to control what documents the Government gets to see and what documents it doesn't." Tr. 6419. Thus, as the court of appeals concluded, "[t]here was no risk of conviction for innocent maintenance of a records program." Pet. App. 28a.[19]

5. Finally, petitioner contends that this Court should grant certiorari to determine whether an informal SEC investigation constitutes an "official proceeding" as defined under 18 U.S.C. 1515(a)(1)(C). Although petitioner raised that issue in the district court, it was mentioned only in a footnote to petitioner's lengthy opening appellate brief. Pet. C.A. Br. 70 n.24. The government therefore contended that the claim had been waived. Gov't C.A. Br. 92 n.34. The Fifth Circuit apparently agreed with the government, declining to address the issue in its opinion. Pet. App. 2a. Because this issue was not "pressed or passed upon below," *Williams*, 504 U.S. at 41, certiorari review is not available.

[19] Without citing any authority, petitioner asserts (Pet. 17) that "virtually all companies of any size [have] adopted document retention policies that permit or require the destruction of potentially harmful materials prior to the initiation of actual proceedings or the receipt of a subpoena." See Pet. 12. In fact, document policies generally protect relevant materials from destruction whenever litigation or government investigations are anticipated. See, *e.g.*, Christopher V. Cotton, *Document Retention Programs for Electronic Records: Applying a Reasonableness Standard to the Electronic Era*, 24 J. Corp. L. 417, 422 (1999) ("In general, records retention programs should * * * provide for the suspension of document destruction when litigation is imminent."); *Lewy* v. *Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988) (corporation cannot destroy documents pursuant to policy if it "knew or should have know that [they] would become material at some point in the future").

In any event, petitioner's claim that a preliminary SEC investigation is not an official proceeding is without merit. Petitioner merely cites (Pet. 30 n.30) two cases in which the courts held that agency investigations with certain characteristics qualified as proceedings under the obstruction statutes; petitioner cites no case, and we are aware of none, holding that a preliminary SEC investigation is not an official proceeding. Courts have long considered agency investigations, even preliminary ones, to be proceedings under the obstruction statutes. See *United States* v. *Browning, Inc.*, 572 F.2d 720, 724 (10th Cir.), cert. denied, 439 U.S. 822 (1978); *United States* v. *Leo*, 941 F.2d 181, 199 (3d Cir. 1991); *United States* v. *Fruchtman*, 421 F.2d 1019, 1021 (6th Cir.), cert. denied, 400 U.S. 849 (1970); *Rice* v. *United States*, 356 F.2d 709, 713 (8th Cir. 1966). Furthermore, contrary to petitioner's argument, the courts have also reasoned that the term "proceeding" is not limited to those aspects of an agency's investigation that are conducted under the authority to issue subpoenas and administer oaths. See *Browning, Inc.*, 572 F.2d at 724 ("We do not see that the use of this machinery [*i.e.*, the regulatory authority to administer oaths] would have made the proceeding more like a 'proceeding' [under Section 1505] simply by virtue of the issuing of a subpoena formally or the giving notice of a preliminary investigation."); see also, *e.g.*, *Leo*, 941 F.2d at 187, 199 (standard post-award audit of defense contractor by Defense Contract Audit Agency was a Section 1505 "proceeding"); *Fruchtman*, 421 F.2d at 1021 (investigation conducted by single FTC attorney who made request to see defendant's invoices was a Section 1505 "proceeding").[20]

[20] Contrary to petitioner's argument (Pet. 3 & n.4), it is irrelevant that the SEC defines a "proceeding" as an agency process initiated by an order

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of the Commission, see 17 C.F.R. 201.202(a)(7) and (9). Congress nowhere incorporated the SEC's definition of "proceeding" into Section 1512. Rather, Congress defined "official proceeding" for purposes of Section 1512 as "a proceeding before a Federal Government agency which is authorized by law." 18 U.S.C. 1515(a)(1)(C). A preliminary investigation by the SEC is "authorized by law," see 17 C.F.R. 202.5(a), and, as noted in the text, the courts have found preliminary investigations to be proceedings.

(5)

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In the Supreme Court of the United States

ARTHUR ANDERSEN LLP,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARGUMENT

It is now apparent why the United States initially waived its opposition and this Court was required to call for a response. The United States is forced to concede that the decision below conflicts at least with the Third Circuit's decision in *United States v. Davis*, 183 F.3d 231 (3d Cir. 1999). And the government's arguments against certiorari are built on sand. Its lengthy (and erroneous) treatment of the facts is an irrelevant digression; its waiver arguments are unfounded; and its legal argument is built around a premise—that an "official proceeding" was already pending when documents were discarded—that the Fifth Circuit rejected and that contradicts the SEC's own regulations.

The Fifth Circuit's interpretation of this statute, and the jury instructions it approved, permit conviction for a wide range of conduct that reasonable individuals would not understand to be criminal, and therefore violates common sense, fairness, the rule of lenity, and the doctrine of constitutional doubt. This case appropriately raises several related issues because that defect could be cured in different ways, including the interpretation of "corruptly" adopted by the Third and D.C. Circuits, a consciousness of wrongdoing requirement, or a meaningful nexus requirement like the one that this Court imposed in *United States v. Aguilar*, 515 U.S. 593 (1995). But this conviction cannot stand under any permissible interpretation of the text, and the circuit conflict conceded by the opposition merits review.

1. The United States devotes much of its opposition to a misleading and one-sided recital of the facts. This reply addresses a few of the more significant errors and omissions in that summary,[1] but the opposition largely misses the

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[1] For example, it is misleading to assert that the document retention policy was not "implemented" until October 12. Opp. 5. Some team members were already in compliance (Tr. 5138-39) and the others were cognizant of the need to comply (*e.g.*, Tr. 3339). Nor is it accurate to suggest that Andersen's policy required retention of all documents by October 12 when Nancy Temple sent a reminder about the policy. Even though Temple indicated that she viewed a future SEC proceeding as a

point. Andersen made clear that it "did not dispute that the evidence was sufficient to support this [conviction]" under the instructions that were given. Pet. 4. Andersen's only factual argument has been that a properly instructed jury could have acquitted—and presumably would have—since the jury declared itself deadlocked after ten days of deliberations even when given instructions that vitiated the government's duty to prove any criminal *mens rea*. There is no legally sufficient evidence that anyone persuaded another to violate a legal duty or believed that their conduct was wrongful, and plenty of evidence from which the jury could have concluded that Andersen did not believe that an SEC proceeding was likely. Indeed, the opposition labors to obscure the undisputed fact that Andersen *was actually correct* in its belief that the accounting issues it was working on in September and October (relating to the "Raptors" entities) would not require an income restatement or lead to a formal SEC proceeding. In the end, they did not. The restatement, and an SEC subpoena, were ultimately the product of Andersen's discovery, for the first time on November 2, 2001, that Enron had withheld information about an entirely different venture called Chewco. *See* Pet. 7-9. The instructional errors discussed in the petition thus cannot be harmless. *The opposition never argues otherwise.*

2. The petition pointed out the absurdity of holding that it was somehow criminally "corrupt" behavior for David Duncan to ask his secretary to discard a document, at a time when it would have been lawful for either of them to discard the document themselves. The brief in opposition glides

"reasonable possibility" (Pet. 5), the SEC had *not* "threatened litigation," which was the trigger for retention of all documents under the policy language cited by the government. And the assertion (Opp. 7) that David Duncan acted out of concern that the "'extraneous material' in petitioner's files could be used against it in ... the SEC investigation" mischaracterizes the testimony. He worried that preliminary materials could be "taken out of context" (Tr. 1888), but repeatedly emphasized that the compliance effort was intended to "make sure we [had] the complete picture ... in case the SEC wants to look at this one day." Tr. 2482.

over that difficulty, and many others, by repeatedly asserting that "during the period when most of the documents were destroyed, petitioner knew that the SEC was investigating Enron, and its decision to destroy documents was thus itself a crime under 15 U.S.C. § 1505." Opp. 20 n.13; *see also id.* at 18, 28-29. The United States even suggests that the Fifth Circuit agreed with its radical view that an informal agency investigation is an "official proceeding," and that petitioner waived the issue. *Id.* at 28. The United States's argument that review should be denied because it could have charged Andersen under § 1505 is unpersuasive; it did not use that section, and could not have.

First, the United States itself obviously did not believe the position it is now advancing or it would have charged Andersen with a violation of § 1505 rather than this novel and convoluted "witness tampering" theory. An "official proceeding" is "a proceeding *before* a Federal Government agency which is authorized by law." 18 U.S.C. § 1515(a)(1)(C) (emphasis added). The leading case on what constitutes a "proceeding" of the SEC under § 1505 held it includes "any investigation directed by a formal order of the Commission, at which a designated officer takes testimony under oath." *United States v. Batten*, 226 F. Supp. 492, 494 (D.D.C. 1964), *cert. denied*, 380 U.S. 912 (1965); *see also United States v. Kelley*, 36 F.3d 1118, 1127 (D.C. Cir. 1994) ("'mere police investigation'" is not a "'proceeding'" under § 1505) (quoting *Batten*); *United States v. Senffner*, 280 F.3d 755, 761 (7th Cir. 2002). The opposition concedes that an informal investigation is not a "proceeding" under the SEC's own regulations and does not have subpoena power. Opp. 29 n.20. The government cites no case holding that an informal investigation like this one could be a "proceeding" under § 1505; indeed, the cases it cites simply follow *Batten*.[2]

[2] *United States v. Browning, Inc.*, 572 F.2d 720, 724 (10th Cir.), *cert. denied*, 439 U.S. 822 (1978), held that a Customs investigation was a "proceeding," but noted that those investigators *had* subpoena power (even if it was not exercised), and, citing *Batten*, specifically distinguished informal investigations by the SEC—stating that "the S.E.C. has more of

Second, although both petitioner and the United States addressed this issue below in lengthy footnotes (with extensive citations), the Fifth Circuit did not find a waiver and it did not agree with the government on the merits. To the contrary, it clearly agreed with petitioner that the informal September/October SEC investigation of Enron was not a "proceeding" and did not become one until the SEC opened a formal investigation in November. The court wrote that "[p]ossible proceedings became a reality on November 8, 2001, when Andersen received an SEC subpoena." Pet. App. 5a. The court reasoned that Andersen "must have known" in September and October "that a restatement of earnings of any appreciable size by a Fortune 500 company would prompt a formal SEC investigation and subpoena for its documents." *Id.* at 12a. But it conspicuously did not hold that the informal investigation that was *already ongoing* was sufficient to make Andersen's conduct a crime. *See id.* at 28a (stating that "the SEC was the feared opponent and initiator of a proceeding" during the relevant period). The Fifth Circuit

a tribunal character than do many other administrative agencies." In *United States v. Leo*, 941 F.2d 181, 198 (3d Cir. 1991), the government conceded that a "proceeding" requires an agency with "rule-making or adjudicative authority." *Rice v. United States*, 356 F.2d 709, 712-13 (8th Cir. 1966), held that an NLRB investigation was a proceeding, but again the government principally relied on the Board's own regulations—which "refer[red] to its investigative aspects as being 'proceedings.'" The court also stressed that a detailed, sworn complaint was filed with the Board that was the "practical equivalent" of a filing in court that would initiate judicial proceedings. *Id.* at 714. And it quoted *Batten* at length for its distinction between "'mere police investigation[s]'" and formal SEC hearings that are "'directed by a formal order of the Commission, [and] at which a designated officer takes testimony under oath.'" *Id.* at 714-15 (quoting *Batten*, 226 F. Supp. at 494). *United States v. Fruchtman*, 421 F.2d 1019, 1021 (6th Cir.), *cert. denied*, 400 U.S. 849 (1970), relied on *Rice* and *Batten to* hold that an vaguely described FTC investigation was a "proceeding." It appears that the investigator had power to administer oaths and issue subpoenas under FTC regulations. *See* 27 Fed. Reg. 4609, 4610 (May 16, 1962) (authorizing investigating representatives of the Commission to administer oaths and affirmations at § 1.32, and at § 1.35 the issuance of subpoenas "related to any matter under investigation").

took Andersen's "nexus" arguments seriously, and ultimately rejected them on other grounds. *Id.* at 25a-28a. If the court had believed that an "official proceeding" was already pending it would have dismissed them as frivolous.

3. The government's suggestion that the decision below "will have little future impact" because the new 18 U.S.C. § 1519 will be the sole charge in future cases has no merit. Opp. 13. First, § 1519 applies only to tampering with "record[s], document[s], or tangible object[s]," and thus cannot be used in the witness tampering cases most commonly prosecuted under § 1512. Nearly all of the key § 1512 cases discussed in the petition and opposition could not have been prosecuted under § 1519. *See, e.g., Davis*, 183 F.3d at 250 (defendant encouraged mobster to kill FBI informant); *United States v. Farrell*, 126 F.3d 484, 486 (3d Cir. 1997) (defendant threatened coconspirator with retaliation if he cooperated with investigators); *United States v. Morrison*, 98 F.3d 619, 629 (D.C. Cir. 1996) (defendant asked witness to lie to police), *cert. denied*, 520 U.S. 131 (1997); *United States v. Shotts*, 145 F.3d 1289, 1299-300 (11th Cir. 1998) (defendant asked employees not to cooperate), *cert. denied*, 525 U.S. 1177 (1999); *United States v. Thompson*, 76 F.3d 442, 447 (2d Cir. 1996) (defendant advised fellow drug dealers not to cooperate). In 2003 and 2004, there have been at least seven written opinions in § 1512(b) "corrupt persuasion" cases, none of which could have been brought under § 1519.[3] And an untold number of indictments did not generate written, searchable opinions.

Second, § 1519 is limited to obstruction of matters "within the jurisdiction of any department or agency of the

[3] *See, e.g., United States v. LaFlam*, 2004 U.S. App. LEXIS 10239 (2d Cir. May 25, 2004), *cert. denied*, 125 S. Ct. 363 (2004); *United States v. Vitagliano*, 86 Fed. Appx. 470 (2d Cir. 2004); *United States v. Amato*, 86 Fed. Appx. 447 (2d Cir.), *cert. denied*, 125 S. Ct. 38 (2004); *United States v. Silas*, 81 Fed. Appx. 758 (3d Cir. 2003); *United States v. Genao*, 343 F.3d 578 (2d Cir. 2003); *United States v. Boyd*, 309 F. Supp. 2d 908 (S.D. Tex. 2004); *United States v. Perez*, 2003 U.S. Dist. LEXIS 15968 (D. Conn. Aug. 29, 2003).

United States." By contrast, § 1512(b) covers all "official proceedings," including civil actions brought by private plaintiffs. Corporate document destruction policies are often designed, at least in part, to prevent aggressive plaintiffs' lawyers from using early or incomplete drafts out of context. That objective is lawful under § 1519, but is a serious felony under the Fifth Circuit's interpretation of § 1512(b). Resolving this circuit split is of great importance to companies willing to cooperate with government investigations but wishing to limit exposure to civil lawsuits.

The Fifth Circuit's interpretation of § 1512(b) permits conviction for a broad range of conduct not covered by § 1519—as illustrated by the serious concerns raised by the Washington Legal Foundation, the Chamber of Commerce of the United States, and the National Association of Criminal Defense Lawyers as *amicus curiae* in this Court.

4. There is a square conflict in the circuits. As the petition explained, any doubt about the law of the Third Circuit after *Farrell* was resolved by *Davis*, which squarely holds that an "improper purpose" instruction like the one given in this case is reversible error. The United States's sole response is a single sentence, which agrees: "In [*Davis*] the court appeared to rely (without any further analysis) on *Farrell's* dicta that 'corrupt' conduct requires more than an 'improper purpose.'" Opp. 20. It therefore concedes that a split exists. As the petition explained, the Third Circuit's subsequent decision in *United States v. Applewhaite*, 195 F.3d 679 (3d Cir. 1999), did not reconsider *Davis* (and could not have—since *Davis* is circuit precedent), and is easily distinguishable on the ground that persuading someone to destroy evidence of a known crime is inherently corrupt. (Indeed it is criminal under 18 U.S.C. § 3). The opposition's response depends on its mistaken assertion that an "official proceeding" was already ongoing in October. Opp. 20 n.13.

The opposition argues that *United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992), does not conflict with this decision because it was decided under § 1505 and distinguished § 1503, which the

government claims § 1512 was "modeled" on. But of course *the D.C. Circuit disagrees*, since it concluded in *Morrison* that § 1512 is similar to § 1505 and that *Poindexter* should govern § 1512 cases. Congress did attempt to overrule *Poindexter* by statute, but went out of its way to provide that "the term 'corruptly' means acting with an improper purpose" *only* "[a]s used in section 1505." 18 U.S.C. § 1515(b). And *Poindexter* squarely holds that an "improper purpose" instruction is vague and likely unconstitutional. Section 1515(b) may force the D.C. Circuit to reach that constitutional issue in the next § 1505 case, but the reasoning of *Poindexter* and *Morrison* makes clear it would never interpret "corruptly" in § 1512 to mean an "improper purpose" unless forced to that interpretation by Congress.

5. On the merits, the United States argues that its "improper purpose" interpretation does not render the word "corruptly" superfluous, because an employee might destroy "embarrassing personal emails" without having an intent to impede the "investigation itself." For present purposes the most important point is that this issue is difficult enough to divide the Circuits. The instruction actually given in this case also defined "corruptly" as an intent to impede "the factfinding ability" of the SEC's investigation—not the investigation itself. There is simply no space between an intent to deprive the SEC of documents that it has asked for and an intent to impede the SEC's "factfinding ability"—but even if there were, that would be slicing the onion so finely that it cannot possibly be what Congress intended.

The opposition's argument (at 18) that Congress has since "closed" that apparent "statutory gap" by passing the new §§ 1512(c) and 1519 commits the classic error of relying on subsequent legislative history to interpret the product of an earlier Congress. That is completely impermissible. If anything, the fact that Congress felt the need to pass new statutes in response to this case suggests its awareness that existing law did not cover Andersen's conduct.

The United States also argues that the interpretation adopted by the Third and D.C. Circuits injects "incongruity"

into the overall scheme of the obstruction statutes because "corruptly" means "improper purpose" under §§ 1503 and 1505. Certainly that is now true of § 1505, although it may well be unconstitutional. But again Congress conspicuously restricted that definition to § 1505. And, as the petition explains, the assertion that "corruptly" has always meant only an "improper purpose" in § 1503 is misleading. Pet. 23. Certainly some courts have given that instruction but many others (including the Fifth Circuit) do not, and in any event § 1503 instructions also require the jury to find that the defendant intended to interfere with a particular, *pending* judicial proceeding—a factual context in which obstruction is inherently corrupt. This Court has squarely rejected the notion that, without such a nexus to a particular pending proceeding, "*any* act, done with the intent to 'obstruct . . . the due administration of justice,' is sufficient to impose criminal liability," even though a jury could easily consider that intent an "improper purpose." *Aguilar*, 515 U.S. at 602.

The government's focus on the § 1512 legislative history rather than the statute's language and structure is of course inappropriate, particularly in a criminal case where the rule of lenity applies. But that history illustrates the flaw in the government's reasoning. The opposition asserts that the "corruptly persuades" clause "was intended 'merely to include in section 1512 *the same protection of witnesses from non-coercive influence that was (and is) found in section 1503.*'" Opp. 17 (quoting 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988)). But the instructions given in this case in fact make § 1512 into a *radical expansion* of § 1503. The petition gave many examples of routine conduct that would be criminal under the government's interpretation of § 1512 that were not before. Pet. 17-18. And the instructions here, by omitting any nexus requirement, would clearly permit under § 1512 the conviction this Court reversed in *Aguilar*.

More broadly, the opposition tries to limit the Third Circuit's decision in *Farrell* to its facts but never grapples with why that case was hard. Why, exactly, is suggesting that someone invoke their Fifth Amendment rights not

"corrupt?" If (as in *Farrell*) the speaker's motivation was to evade punishment for a crime then that is certainly an "improper purpose" and intended to harm the factfinding ability of an official proceeding. But it nonetheless is not "corrupt" because of a common understanding that, in a free society like ours, certain forms of non-cooperation fall within the boundaries of legitimate self-defense under the law. The theory of this prosecution makes a criminal out of anyone who advises a friend not to comply with a voluntary request for documents from the SEC, to construe a subpoena narrowly rather than broadly, or to invoke their lawful rights under the constitution. *The brief in opposition never denies that.* The phrase "corruptly persuades" is plainly insufficient to put a person of common intelligence on notice that such a radical transformation of the law has occurred.

The opposition objects to the petition's "due process rhetoric" and suggests that any due process claim has been waived. Opp. 13-14, 21. That is a red herring. Even the Fifth Circuit acknowledges that "corruptly persuades" is vague, Pet. App. 19a, and the *Farrell/Poindexter* reading is plainly a permissible one. Common sense, the rule of lenity, and the doctrine of constitutional doubt therefore require it—and there is thus no need to reach the constitutional issue. But petitioner has properly argued, here and below, that due process and lenity "fair warning" values must inform the interpretation of this statute. *See* Appellants Br. at 59, 67, 75; Reply Br. at 1, 21-24. And the facts of this case plainly supported the conclusion that Andersen employees had no warning that their conduct was unlawful. Pet. 7.

6. The opposition's discussion of *Ratzlaf v. United States*, 510 U.S. 135 (1994), and *Bryan v. United States*, 524 U.S. 184 (1998), misses the petition's point. True, the *mens rea* term "corruptly" does not always require consciousness of wrongdoing. But if a statute is otherwise interpreted to criminalize conduct that is not "obviously 'evil'" or "inevitably nefarious," *Ratzlaf*, 510 U.S. at 144-46, fair warning and lenity principles may require that vague *mens rea* terms like "willfully" or "corruptly" be given a stronger

than usual meaning. If the *Farrell/Poindexter* limiting construction of the word "corruptly" and the various nexus instructions requested by petitioner are all rejected, this statute criminalizes conduct that a reasonable person would not understand to be criminal. The United States entirely misunderstands *Ratzlaf* and *Bryan* by suggesting that their holding is bound up with the word "willfully"—which is just as vague as "corruptly," does not usually require knowledge of wrongdoing either, and as a matter of plain meaning conveys much less culpability and awareness of wrongdoing.

7. The opposition argues that petitioner waived the nexus issue by failing to request an instruction that it could not be found guilty unless it believed an SEC proceeding was "likely" or "probable," or by not citing *Aguilar*. Opp. 24-26. But Andersen consistently argued that the instructions were incorrect because they failed to require a meaningful nexus between its conduct and some concretely threatened particular proceeding. Because the Fifth Circuit had already stated in *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir.), *cert. denied*, 501 U.S. 1209 (1991), that § 1512 requires an "intent to affect testimony at some particular federal proceeding that is ongoing or scheduled to be commenced in the future," petitioner phrased its requested instruction that way. A defendant that clearly explains why an instruction is incorrect need not guess precisely what formulation an appellate court will ultimately hold to be correct. Pet. 29. The opposition cites no contrary precedent. And Andersen did cite *Aguilar*. R. 931.

The opposition's argument at 24 n.16 that Andersen *did* know an official proceeding was "likely" or "probable" is an irrelevant factual quarrel. There was plenty of evidence that would permit the jury to reach a different conclusion, and the opposition does not even suggest that this error was harmless beyond a reasonable doubt. *See* Pet. 29.

CONCLUSION

Andersen had no fair warning that its conduct might be criminal, and would not have been convicted in the Third or D.C. Circuits. Review is necessary to resolve that conflict.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ARTHUR ANDERSEN LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 11,500 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations. In furtherance of this and its other objectives, the NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.[1] NACDL has a particular interest in this case because the decision of the Court below could interfere with the ability of NACDL's members to represent their clients, subject NACDL members to punishment for zealous advocacy, and undermine the adversarial process essential to fairness in the criminal justice system.

SUMMARY OF ARGUMENT

The Fifth Circuit's reading of the federal witness tampering provision presents lawyers with the risk of

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored any part of the brief, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

prosecution and imprisonment for doing their jobs. This case illustrates, but does not delimit, the dangers of the court's approach. The government obtained a conviction of Arthur Andersen LLP ("Andersen") for knowing and corrupt obstruction of justice under 18 U.S.C. § 1512(b)(2). The indictment focused on the destruction of documents related to Andersen's auditing work for Enron Corporation. An in-house lawyer and other officials advised Andersen employees to comply with Andersen's established document retention policy, which itself was legal. The lawyer also edited a draft of an internal company memorandum. At the time of the charged offense, these individuals anticipated that the Securities Exchange Commission ("SEC") might investigate, but Andersen had received no subpoena or other notice of a formal investigation regarding Enron's accounting practices.

On appeal, the Fifth Circuit affirmed the conviction. The court held, among other things, that the trial court had properly instructed the jury that a defendant "corruptly persuade[d]" another person, in violation of Section 1512(b), if the persuasion had "an improper purpose." Pet. App. 17a-25a. The court of appeals further upheld the trial court's instruction that "an improper purpose" meant "an intent to subvert, undermine, *or impede* the fact-finding ability of an official proceeding." Pet. App. 21a-22a (emphasis supplied). The trial court had instructed that "[t]he improper purpose need not be the sole motivation for the Defendant's conduct so long as the Defendant acted, at least in part, with that improper purpose." Pet. App. 48a. Thus, as long as intent to impede the fact-finding ability of a government investigation is one of several motivations, a defendant has acted "corruptly."

The ruling below places criminal defense lawyers in peril. When a lawyer represents a client in connection with a potential criminal investigation, one of the lawyer's goals may well be to prevent the government from developing

evidence against the client. Under the court of appeals' sweeping holding, that goal is "improper" and it reflects a "corrupt" purpose. And any action by the lawyer – such as vigorously asserting privileges, or counseling potential witnesses about their rights, or, as here, advising employees about the company's document retention policies and editing draft memoranda – potentially violates the statute if it is motivated even in part by this goal. This overbroad definition of the phrase "corruptly persuades" in Section 1512(b) conflicts with the approach adopted by other Circuits.

If allowed to stand, the decision below will chill criminal lawyers from zealously advocating for their clients. On every close call regarding tactical and legal issues – and on many that are not so close – lawyers will have to weigh in the balance their own potential exposure to criminal liability. The government, with this expanded ability to punish the conduct of defense counsel, will gain the concomitant right to investigate that conduct, with the potential to drive an even greater wedge between lawyer and client. And while 18 U.S.C. § 1515(c) purports to protect "lawful, bona fide legal services," after the Fifth Circuit's decision the safe haven provided by this section is illusory.

This case demonstrates what is at stake. The conduct of Andersen's in-house lawyer was central to the government's case. According to post-conviction interviews with jurors, it was *the* basis for conviction. The result reached by the Fifth Circuit collides with the fundamental premises underlying our system of criminal justice. It is important that the Court resolve this case now to prevent further damage to the rights of defendants and the integrity of the judicial process.

ARGUMENT

I. THE FIFTH CIRCUIT'S INTERPRETATION OF "CORRUPTLY PERSUADES" IS WRONG AND PLACES LAWYERS AT RISK.

A. "Corruptly Persuades"

The Fifth Circuit interpreted 18 U.S.C. § 1512(b)(2) to criminalize the act of persuading another to alter, destroy, conceal, or withhold evidence from an official proceeding, not yet commenced, with the intent of impeding fact-finding in that proceeding. In reading the statute expansively to reach the legal services at issue in this case, the court potentially swept in a broad range of attorney conduct.

Section 1512(b)(2) makes it a crime to "*corruptly persuade*[] another person" with intent to "induce any person to . . . withhold a record, document, or other object from an official proceeding; [or] alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . ." 18 U.S.C. § 1512(b)(2)(A)&(B) (emphasis supplied). The district court, in instructing the jury here, defined the term "corruptly persuade" to mean "having an improper purpose," which in turn the court defined as "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." Pet. App. 48a. As Andersen demonstrates in its petition for a writ of certiorari, these jury instructions essentially read the word "corruptly" out of the statute and conflate "improper conduct" with the intent to make evidence unavailable to an official proceeding. In other words, the government can prove "corrupt" persuasion merely by satisfying another requirement of the statute (intent to induce another to withhold, alter, destroy, mutilate, or conceal evidence).

The Fifth Circuit's decision tries, but fails, to show that the two intent requirements are *not* strictly identical. *See* Pet. App. 21a-22a. (distinguishing intent to induce another to make document unavailable and intent to hinder fact-finding ability of proceeding, which implies greater "degree of personal culpability"). Yet the realities of this case highlight the futility of the court's exercise in wordplay: if a lawyer or client can be guilty of subverting, undermining, or impeding the fact-finding function of an investigation simply by discussing lawful methods of disposing of documents or editing internal drafts, then *any* attempt to persuade a person to take the steps listed in the statute may be found to be corrupt. Indeed, if to "impede" an investigation is to "hold [it] up," as the Fifth Circuit defines the term, Pet. App. 22a, any action intended to reduce the availability of information and make investigators look elsewhere would constitute a crime.[2]

B. Lawyers at Risk

As a result of the Fifth Circuit's decision, legal advice previously considered unexceptional may now be criminal. Advising a client to edit a memorandum, proposing a new document retention policy, persuading counsel for a witness to interpret a subpoena narrowly – all may well reflect a desire to withhold or conceal evidence from an official proceeding. Hence, all are "corrupt" under the Fifth Circuit's decision, even if the lawyer has a sound legal basis for each piece of advice rendered. As a result of the ruling below, which effectively reads the term "corruptly" out of Section 1512(b), the act of persuasion – including the process of lawyering itself – is now on par with "intimidation" and "threat[s]." These forms of conduct are prohibited, provided

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[2] The "impede" prong of the jury instruction defining "an improper purpose" was added at the request of the government, over the objection of Andersen. Pet. App. 22a.

that the actor has the intent to withhold, alter, destroy, or conceal evidence from an official proceeding. The court of appeals' reading of the statute stretches the concept of witness tampering beyond reasonable bounds.

This case demonstrates precisely what is at stake. To a significant extent, the government's presentation focused on the conduct of Andersen's in-house lawyer, who advised others in the company to comply with the document retention policy and who edited a draft internal memorandum. According to press accounts, the jurors unanimously agreed that the lawyer had "corruptly persuaded" others to withhold evidence. *See, e.g.*, Jonathan Weil et al., *Auditor's Ruling: Andersen Win Lifts U.S. Enron Case*, Wall St. J., June 17, 2002, at A1; Mary Flood, *The Andersen Verdict; Decision by Jurors Hinged on Memo*, Hous. Chron., June 16, 2002, at A1. In fact, the jurors focused not on the document retention policy, but on the lawyer's proposed edits to the memorandum – activity that lawyers engage in every day. *Id.*

Indeed, the ruling of the court of appeals puts lawyers more broadly at risk.

First, the Fifth Circuit's interpretation of the term "corruptly" likely applies to other provisions of Section 1512, which reach far beyond the destruction or alteration of documents. Under Section 1512(b)(1), it is unlawful to "corruptly" persuade another person with the intent to influence, delay, or prevent the testimony of any person in an official proceeding. Under Section 1512(b)(3), it is unlawful to "corruptly" persuade another person with the intent to delay or prevent the reporting of a possible federal offense to a law enforcement officer. Under Section 1512(c)(1), whoever "corruptly" alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding, is subject to criminal liability.

Under Section 1512(c)(2), whoever "corruptly" obstructs, influences, or impedes any official proceeding, or attempts to do so, is subject to criminal liability. If acting "corruptly" means nothing more than taking steps with an intent "to impede" an investigation, criminal defense counsel and in-house lawyers face the risk of investigation, prosecution, and imprisonment for performing many of their day-to-day responsibilities.

Second, the court below held that the smallest dose of "corrupt" intent is sufficient to taint the defendant's conduct. The district court defined "corruptly" as having "*an* improper purpose" and expressly directed the jury that "[t]he improper purpose need not be the sole motivation for the Defendant's conduct so long as the Defendant acted, at least in part, with that improper purpose." Pet. App. 48a (emphasis supplied). Thus, a lawyer in the Fifth Circuit could have numerous legitimate motives for an act of persuasion – preserving the attorney-client privilege, complying with ethical obligations, testing the legal bases of the government's claims – but if she also has the intent to hold up an investigation as a third or fourth order goal, she has potentially committed a crime.

Third, the broad sweep of the term "official proceeding" in Section 1512 multiplies the opportunities to ensnare lawyers, and thereby to intrude on the zealous representation of their clients. Section 1512 expressly provides that the official proceeding "need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(f)(1). The district court declined to instruct the jury, as Andersen requested, that an official proceeding had to be "ongoing or . . . scheduled to be commenced" or even that the corrupt persuader must have "had in mind a particular proceeding that it sought to obstruct." Pet. App. 26a. The court of appeals seemed to sense the potential for havoc in its expansive reading of the statute, conceding that Andersen's position was "not without force" and that perhaps "a

defendant's intent to impede a proceeding [should] have some limiting sights." Pet. App. 27a. But the court provided no such "limiting sights." It upheld the district court's instruction, leaving lawyers potentially liable for tampering whether there are "investigators around the corner," Pet. App. 25a, or even anywhere on the horizon.

As argued below, the Fifth Circuit's reading of Section 1512(b) intrudes on a broad range of conduct that is part of the traditional defense of criminal cases. As a result of the conflict between Circuits discussed in Andersen's petition, many lawyers may be inclined to follow the safest course of action and avoid giving any advice that might expose them to criminal investigation. The Court should correct the erroneous ruling below. The integrity of the criminal justice system is at stake.

II. THE FIFTH CIRCUIT'S INTERPRETATION OF "CORRUPTLY PERSUADES" WILL CHILL THE ZEALOUS REPRESENTATION OF CLIENTS.

A. An Attorney's Role as Zealous Advocate

A lawyer has a duty to advocate zealously on behalf of a client within the boundaries of the law. *See, e.g.*, *Penson v. Ohio*, 488 U.S. 75, 84-85 (1988) ("[I]t is through counsel that all other rights of the accused are protected . . . . [F]orceful advocacy . . . ensure[s] that rights are not foregone."). Indeed, the need for forceful and vigorous advocacy is of paramount importance to our adversary system of justice. *See id.* As described by the Ninth Circuit, "[Z]ealous advocacy is the attorney's ideal. Hard-fought, energetic and honest representation is at the bedrock of our judicial process." *Yagman v. Baden*, 796 F.2d 1165, 1182, *modified*, 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987).

In order to pursue "zealous" representation of any kind, a lawyer must know the boundaries between advocacy and obstruction. The Fifth Circuit's decision blurs these lines and will deter defense attorneys from doing their jobs the way they should. Criminal defense lawyers, uncertain of the reach of Section 1512 and how a prosecutor might perceive their conduct, may draw back from legitimate and zealous advocacy for their clients. As one legal scholar noted, "What makes the risk of overdeterrence particularly troubling is that, in a criminal case, the rendition of zealous representation is not simply desirable and encouraged by the law, but to some extent constitutionally mandated." Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 Fordham L. Rev. 327, 329 (1998). The Fifth Circuit's opinion will both chill a lawyer's advocacy and advice and sacrifice the rights of the accused. *Cf. United States v. Seale*, 461 F.2d 345, 367 n.44 (7th Cir. 1972) ("[P]unishing conduct where the intent to be insubordinate is not clear, might very well have the result of deterring an attorney of less courage and experience from doing his full duty to his client.") (internal quotation marks and citations omitted).

It is the essence of our adversary system that many strategies legitimately developed and executed by criminal defense lawyers "impede the fact-finding ability" of a government investigation. Kenneth Mann, *Defending White Collar Crime* 5 (1985) ("[T]his is the central theme of the white-collar crime defense function, the defense attorney works to keep potential evidence out of government reach by controlling access to information."). In blurring critical lines and making such tactics potentially criminal, the decision below can affect lawyers in many predictable ways. For example:

- A client possesses critical (and exclusive) information in a case being investigated by the government and likely to proceed to the grand jury stage.

Investigators request an informal interview and the lawyer advises the client to refuse to cooperate. The client follows this advice and the government never learns the critical facts. Under the Fifth Circuit's reasoning, the lawyer's advice would potentially violate Section 1512(b)(2)(A) because he "induce[d] [a] person to . . . withhold testimony . . . from an official proceeding."

- An in-house attorney is asked to review a draft report that must be sent to the SEC. The lawyer and client are well aware that after the report is issued, the government will likely use it in an anticipated investigation. The lawyer suggests changing the language of the draft to exclude factual information that is not technically required in the report, but which he knows would greatly assist the government's fact gathering. The client deletes the offending language. The lawyer's advice would "cause . . . [a] person to . . . alter . . . an object," potentially in violation of Section 1512(b)(2)(B).

- A client corporation receives a grand jury subpoena for documents as part of an antitrust investigation. The lawyer advises the client that certain documents, such as the personal calendar of a company executive, are personal documents and not corporate documents, and hence are not responsive to the subpoena even though they contain relevant information. As a result, the client does not produce documents that would help the government build its case. The lawyer's advice would potentially violate Section 1512(b)(2)(B) because it "cause[d] [a] person to . . . withhold . . . [a] document . . . from an official proceeding."

- A client is subpoenaed before a grand jury. She has relevant information but she is concerned about embarrassment or perhaps unrelated civil consequences should the information ever become public. Her lawyer counsels her not to volunteer any information, to answer only the question asked, and to interpret the scope of each question as narrowly as possible. The client follows the advice. The government fails to ask the right questions and never learns the information that she does not volunteer. Again, the lawyer's advice has "induced" the withholding of testimony from an official proceeding, potentially in violation of Section 1512(b)(2)(A).

Under the Fifth Circuit's opinion, these routine judgment calls expose the attorney to potential criminal liability. The attorney has devised strategies and "persuaded" a client to follow them for the purpose, in part, of preventing the government from learning important factual evidence. Under the jury instruction approved by the Fifth Circuit, any purpose to "impede" the fact-finding mission of a government investigation is corrupt. It is no defense that the conduct that the attorney recommends is itself legal, or that the attorney believed in good faith that his or her conduct conformed to the law. In this case, the creation and execution of Andersen's document retention policy was also legal. Andersen employees could have followed the policy themselves, because no formal proceeding had yet commenced, yet a lawyer's advice that they do so becomes "corrupt" and criminal.

The Fifth Circuit's overbroad interpretation of the obstruction statute all but erases the line between zealous advocacy and obstruction, making it impossible for a lawyer intelligently to ascertain where his constitutional and ethical duties as an effective advocate end, and his exposure to criminal liability for obstruction of justice begins.

B. Chilling the Attorney-Client Relationship

Even assuming the government would refrain from exercising its prosecutorial discretion in all of the circumstances described above, the chilling effect of the Fifth Circuit's decision will adversely affect the attorney-client relationship. Lawyers who are uncertain of where the outer boundaries lie will shy away from zealous representation, and may fail to carry out legal and other important strategies on behalf of their clients for fear of their own personal liability. Indeed, courts have reversed convictions when defense counsel faced personal consequences far less severe than a potential conviction under Section 1512(b), which can result in fines and imprisonment of up to 10 years. 18 U.S.C. § 1512(b).[3]

The Fifth Circuit's decision also risks compromising the attorney-client privilege. For more than one hundred years, this Court has recognized that the "administration of justice" depends on the ability of individuals seeking legal assistance to confide in an attorney without the "apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). Commentators likewise have acknowledged that confidentiality is the bedrock of the attorney-client relationship. *See, e.g.*, ABA/BNA Lawyer's Manual on Professional Conduct, No. 269 at 55:302 (2004) ("[C]onfidentiality facilitates the fact-finding process that is critical to representation and also has the effect of

[3] *See, e.g., Walberg v. Israel*, 766 F.2d 1071 (7th Cir.), *cert. denied*, 474 U.S. 1013 (1985) (reversing defendant's conviction when lawyer's desire to receive future appointments from trial judge may have prevented defense counsel from pursuing vigorous defense); *United States v. Ah Kee Eng*, 241 F.2d 157, 161 (2d Cir. 1957) (recognizing potential for injustice when judge personally belittles defense counsel's positions because "[a] less experienced advocate might well have trimmed his sails . . . and thus have jeopardized the rights and the proper interests of a defendant on trial for a serious felony").

encouraging early legal consultation.") (citing Model Rule of Prof'l Conduct R. 1.6 cmt.). A client's confidences have been protected both by the attorney's ethical duty of confidentiality and by the evidentiary privilege afforded to attorney-client communications.

The Fifth Circuit's interpretation of the tampering statute expands a federal prosecutor's grounds for inquiring into attorney-client communications.[4] Now, a prosecutor is empowered to issue a subpoena on the allegation that an attorney "corruptly persuaded" his or her client to "impede the fact-finding ability" of a potential investigation. Careful lawyers will have to consider whether their defense strategy will protect their client's interest or will result in the disclosure of confidential communications.

The prospect that the defense counsel's adversary in a criminal case can investigate the conduct of the defense, including subpoenaing counsel before the grand jury, will dramatically alter, or chill, the attorney-client relationship. *See* ABA/BNA Lawyer's Manual on Professional Conduct, No. 269 at 55:1301 (2004). The looming possibility of a subpoena could well make attorneys even more cautious in representing their clients. Indeed, a lawyer would be ethically bound in many cases to advise the client of this possibility that defense conduct may come under investigation, with the consequence that the client may wonder whether the lawyer's advice is tainted by personal concerns and may choose not to speak candidly with the

[4] Such intrusion into attorney-client confidences has been justified by extreme circumstances such as an attorney's deliberate effort to tamper with witnesses, destroy subpoenaed materials, or engage in fraud upon the court. *See, e.g., Osborn v. United States*, 385 U.S. 323 (1966); *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983); *In re Doe*, 662 F.2d 1073, 1080-81 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

attorney. Unless this Court takes this case and clearly demarcates the boundaries of Section 1512, the fear engendered by a vague standard, haphazardly applied, could well undermine fundamental tenets of the American system of justice.

III. THE SAFE-HAVEN PROVISION OF SECTION 1515(C) DOES NOT ELIMINATE THE CHILL ON ZEALOUS ADVOCACY CREATED BY THE FIFTH CIRCUIT'S OPINION.

The so-called "safe-haven" protection of Section 1515(c) does not dissipate the chilling effects of the Fifth Circuit's expansive interpretation of Section 1512(b). On its face, Section 1515(c) provides a safe haven for "lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." 18 U.S.C. § 1515(c). Some courts have suggested that this provision "is a complete defense to obstruction of justice." *United States v. Kloess*, 251 F.3d 941, 946 (11th Cir. 2001); *United States v. Kellington*, 217 F.3d 1084, 1098 (9th Cir. 2000). The Eleventh Circuit has stated that "one who is performing bona fide legal representation does not have an improper purpose. His purpose – to zealously represent his client – is fully protected by the law." *Kloess*, 251 F.3d at 948. That *should* be the law. But it is not in the Fifth Circuit. Section 1515(c) does not dispel the chill on effective advocacy that the court of appeals has created.

The Fifth Circuit's reading of Section 1512(b) creates a circularity that essentially nullifies the safe haven provision. Section 1515(c) applies only to "lawful, bona fide" representation. Under the jury instructions upheld by the court below, however, any advice rendered with the intent to "impede" an investigation is "improper"; that which is improper is "corrupt"; and that which is corrupt is not lawful. As already noted, many accepted strategies employed by

lawyers are intended to "impede" factual investigation. Moreover, under the Fifth Circuit's standard, if there were other motivations for the strategy, and even if those other motivations were predominant, any sliver of intent to impede creates a lingering taint. Defense counsel thus cannot be certain that prosecutors will refrain from investigating and prosecuting otherwise bona fide legal representation that impedes the fact-finding ability of an official proceeding – despite the illusory promise of Section 1515(c).

The result is that counsel may well be hindered from zealously protecting their clients' interests for fear that their advocacy could create liability for themselves. This would staunch the essential flow of information between attorney and client.

CONCLUSION

The petition for certiorari should be granted, and the conviction should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ARTHUR ANDERSEN LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* WASHINGTON LEGAL FOUNDATION AND CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a national non-profit public interest law and policy center. WLF devotes substantial resources to litigating cases and filing *amicus* briefs urging rules of law that promote free enterprise and limit government to make it more accountable in all contexts, including criminal law enforcement actions by the Department of Justice. WLF has participated as *amicus* in numerous cases which, like the present one, raise important issues regarding *mens rea* requirements in federal criminal statutes.[1]

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community. The potential criminalization of corporate compliance with document retention policies is an issue of concern to the Chamber and many of its members which have adopted such policies. The broad interpretation of vague, ambiguous criminal statutes does not provide the business community with the guidance it needs to comply with the law on the obstruction of justice.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the government charged Arthur Andersen & Co. ("Andersen") with the willful obstruction of justice

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

because Andersen employees requested that other employees comply with the Company's document retention policy at a time when a formal investigation by the Securities Exchange Commission ("SEC") was possible but far from certain. That charge and ultimate conviction devastated Andersen, eliminating it from the already concentrated field of national accounting firms and resulting in the destruction of tens of thousands of jobs. While enforcement of the criminal law often has overwhelming consequences for affected persons and industries, its predicate must be a legislative judgment that specified conduct is plainly unlawful. This predicate was not satisfied in the case under review or in the legal rule adopted by the Fifth Circuit.

The witness tampering statute was amended in 1990 to add the criminal prohibition at issue here. Section 1512(b) of Title 18 criminalizes the knowing, corrupt persuasion of another person to destroy documents with an intent to impair the documents' availability for use in an official proceeding. In the brief period since the statute was amended, an acknowledged and mature conflict among the courts of appeals has developed concerning the meaning of knowing and corrupt persuasion. Some circuits, including the Fifth Circuit, say that it requires nothing more than persuasion with an improper purpose. Other circuits, such as the Third and D.C. Circuits, say that equating corrupt persuasion with persuasion for an improper purpose is not only impermissibly vague, but also makes the corruption requirement mere surplusage, because § 1512(b)(2)(B) already expressly requires that the persuasion be intended for the improper purpose of impairing an official proceeding. All courts appear uncomfortable with loosely defining "corrupt persuasion" as persuasion with an "improper purpose"; even the Fifth Circuit recognized that it casts only a "dim light . . . upon its meaning, its circularity aside." App. 19a.

The described conflict alone warrants this Court's intervention, but the particular problems generated by an

ongoing conflict in this legal setting make the argument for certiorari compelling. Continuing percolation of the conflicting legal rules adopted by the circuit courts is wholly inappropriate here. Initially, section 1512(b) is a criminal statute which, under our Constitution, must provide persons with reasonably clear guidance and notice about what conduct is subject to criminal sanction. See *United States* v. *Kozminski*, 487 U.S. 931 (1988). Moreover, here, the generic problem arising when there are conflicting interpretations of a vague criminal law is exacerbated by the fact that § 1512(b) has been interpreted to criminalize a non-coercive request to an employee to comply with a company's lawful document retention policy. Thus, the federal government purports to criminalize conduct that is part of numerous businesses' everyday routine and that was undertaken without any consciousness of wrongdoing. The price of allowing case-by-case evolution of the interpretation of § 1512(b) is painfully high for the individuals and businesses affected. This point is underlined by the high profile of this case and the destructive consequences of the conviction, which together have cast a pall over the administration of routine document retention policies. As we show *infra*, all of this could and should have been prevented by the appropriate use of the rule of lenity.

The petition for certiorari clearly lays out the conflicting interpretations of the statute and the importance of this Court's intervention. In this brief, accordingly, *Amici* focus on the role that the rule of lenity should have played in interpreting § 1512(b). *Amici* will show that this case provides an excellent vehicle for the Court to provide instruction about the rule of lenity, while resolving an inter-circuit conflict over the meaning of an important criminal statute whose application to the administration of document retention policies is now entirely unclear.

ARGUMENT

I. THE DECISION BELOW SUBVERTS THE RULE OF LENITY AND, IN DOING SO, EXACERBATES A CIRCUIT SPLIT.

As the petition demonstrates, the Fifth Circuit's interpretation of § 1512(b)'s *mens rea* requirement broadens an existing conflict between the Third and D.C. Circuits on the one hand, and the Second and Eleventh Circuits on the other. Pet. 18-26.[2] On both sides of the split, the cases make evident that § 1512(b) is ambiguous. The circuits' diverging views can only be resolved by this Court. See generally Gary G. Grindler & Jason A. Jones, *Please Step Away From the Shredder and the "Delete" Key: §§ 802 and 1002 of the Sarbanes-Oxley Act*, 41 Am. Crim. L. Rev. 67, 74 (2004) ("The meaning of 'corruptly persuades' under § 1512(b) is, unfortunately, perhaps even less certain than the interpretation of the similar language in §§ 1503 and 1505; there is much disagreement between the circuits").

In addition to deepening a pre-existing circuit split, the Fifth Circuit's determination that the ambiguous "corruptly persuades" language criminalizes the conduct of a defendant who acts with an "improper purpose" reflects a fundamental misunderstanding of the rule of lenity. Correctly applied, this rule resolves the interpretation of ambiguous criminal law statutes in favor of their strict construction and has the potential to prevent the troubling development of inter-circuit conflicts about the interpretation of such statutes. The failure to use the rule of lenity to resolve ambiguity concerning a criminal law leads to (a) the misinterpretation of criminal

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[2] Without expressly resolving the proper interpretation of § 1512(b), the Eighth Circuit has recognized the statute's ambiguity, *United States* v. *Pennington*, 168 F.3d 1060, 1066 (8th Cir. 1999), and the Ninth Circuit has acknowledged the statute's competing interpretations, *United States* v. *Khatami*, 280 F.3d 907, 912-13 (9th Cir.), *cert. denied*, 535 U.S. 1068 (2002).

statutes, (b) confusion and conflict and thus inadequate notice about the rules governing conduct that can lead to moral condemnation and punishment, and (c) chaos and disruption when this Court eventually resolves the conflict because there are always issues of retroactivity and of the applicability of the new rules in habeas proceedings. Accordingly, the Court should use this case as a vehicle to resolve the conflict concerning § 1512(b), and to instruct the lower courts in the proper application of the rule of lenity.

A. The Rule Of Lenity Is A Vital Tool Of Statutory Construction For Ambiguous Statutes.

Originating in England during the late seventeenth and early eighteenth centuries to protect individuals from the expansive imposition of the death penalty, see Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 Harv. C.R.-C.L. L. Rev. 197, 199-200 (1994), the rule of lenity remains a substantive canon of statutory interpretation essential to guarding individual rights. The rule mandates that courts faced with statutory ambiguity or more than one plausible reading of a criminal statute take the narrowest view. See *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987) ("when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language") (citing cases); cf. 1 William Blackstone, *Commentaries* *92 ("[a] man cannot suffer *more* punishment than the law assigns, but he may suffer *less*"). As explained below, the Fifth Circuit's interpretation of the ambiguous "corruptly persuades" element of § 1512(b) ignored the rule of lenity and interpreted the provision expansively rather than narrowly.

The foundations of the American rule of lenity were laid in *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820). Chief Justice Marshall, interpreting the Crimes Act of 1790, held that this statute, which granted federal jurisdiction over cases involving manslaughter committed on an American

vessel on the "high seas," did not apply to cases involving manslaughter committed on a vessel docked on a river in China. The Court strictly construed the statute, stating:

> The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment. [*Id.* at 95.]

See *id.* at 105 (in the absence of Congressional action "this Court cannot enlarge the statute").

Following *Wiltberger*'s teaching, strict construction of criminal statutes became the governing canon within United States courts. For example, in *United States* v. *Lacher*, 134 U.S. 624, 628 (1890), the court held that "before a man can be punished, his case must be plainly and unmistakably within the statute." See also *Ladner* v. *United States*, 358 U.S. 169, 178 (1958) ("[T]he Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended"); *Bell* v. *United States*, 349 U.S. 81, 83 (1955) (Frankfurter, J.) (it is "a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a higher punishment").

This Court has set forth two primary reasons for the rule of lenity: ensuring legislative supremacy and providing proper notice to the public of what conduct is criminal. In *Wiltberger*, Chief Justice Marshall emphasized that the rule was intended to guarantee legislative supremacy in the establishment of criminal law. See 18 U.S. at 95-97, 105-06. This Court later explained that "'because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.'"

United States v. *Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in Benchmarks* 196, 209 (1967)). Cf. *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (the most important aspect of the prohibition of vague criminal statutes is "the requirement that a legislature establish minimal guidelines to govern law enforcement") (internal quotation marks and citation omitted).[3]

This Court has also elaborated on the rule's role in ensuring that the public is provided with adequate notice of the standards governing conduct and imposing criminal punishments. Justice Holmes, writing for the Court in *McBoyle* v. *United States*, 283 U.S. 25 (1931), stated:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that fair warning should be given to the world in language that the common world will understand . . . . To make the warning fair, so far as possible the line should be clear. [*Id.* at 27.]

Accord *Bass*, 404 U.S. at 347-49. Thus, the rule of lenity is among the "[s]ound principles of statutory construction [which] lead [the Court] to reject the amorphous definitions" that create room for arbitrary and unfair decisions by allowing judges to develop standards of criminal punishment on a case-by-case basis. *Kozminski*, 487 U.S. at 951.

Application of the rule of lenity is particularly important in cases, such as this one, involving ambiguous *mens rea* requirements. *Mens rea* requirements offer statutory protection for inadvertent violations of criminal law requirements that are not *malum in se*. For example, in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438 (1977)

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[3] In this manner, the rule of lenity serves as a companion to the doctrine of constitutional doubt in effectuating the intent of the legislature and avoiding the creation of constitutional peril through broad interpretation of ambiguity. *Cf. Almendarez-Torres* v. *United States*, 523 U.S. 224, 270-71 (1998) (Scalia, J., dissenting).

(plurality opinion), this Court observed that the line between routine, acceptable business conduct and criminal conduct is difficult to discern, and further that the Sherman Act, "unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes." As a result, it was critically important to apply the rule of lenity and interpret the Act to impose the traditional criminal *mens rea* requirement of a knowing violation of the law. See also *Liporata* v. *United States*, 471 U.S. 419, 427-29 (1985) (finding a statutory provision forbidding the knowing transfer of food stamps to be ambiguous concerning whether the seller had to know the sale was illegal and applying the rule of lenity); *Ratzlaf* v. *United States*, 510 U.S. 135, 141-49 (1994) (same, regarding the "willful" evasion of currency structuring laws).

This Court's jurisprudence continues to make the rule of lenity the determining principle of construction when the text, structure and legislative history of a criminal statute are ambiguous about its meaning and application. Most recently in *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), the Court again stated that "'when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.'" *Id.* at 409 (alteration omitted) (quoting *McNally*, 483 U.S. at 359-60). See also *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) ("where text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor") (citing *Bass*, 404 U.S. at 347-49); *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) (when "ambiguity survives," the court "choose[s] the construction yielding the shorter sentence by resting on the venerable theory of lenity"); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (the rule of lenity applies where the text, structure and history of the statute leave reasonable doubt about the statute's intended scope).[4]

As we show *infra*, the rule of lenity applies in this case and should have guided all courts of appeals to a strict construction of § 1512(b). Indeed, once the Fifth Circuit acknowledged that defining "'corruptly' in terms of improper purpose" is "circular[]" and casts only "dim light" upon its meaning and that other tools of statutory guidance did not resolve § 1512(b)'s ambiguity, App. 19a, that court should have applied the rule of lenity and concluded that the statute did not criminalize Andersen's actions in this case.

B. Courts On Both Sides Of The Split Agree That § 1512(b) Is Ambiguous.

While the circuits' approach to the "corruptly persuades" cases is anything but consistent, one coherent theme emerges: § 1512's text is ambiguous, and even the circuits that do not find it void for vagueness have resorted to subsidiary aids to statutory construction in order to provide meaning. The legislative history and other aids to construction, however, are as vague as the text. This is precisely the situation in which a court should apply the rule of lenity, but the Fifth, Second and Eleventh Circuits have failed to do so.

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[4] There is a debate among justices of this Court concerning whether the rule of lenity applies whenever statutory text is ambiguous or only in "situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal*, 498 U.S. at 108 (quoting *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980)). *See id.* at 131-32 (Scalia, J., dissenting) (debating the majority's characterization of the rule); *R.L.C.*, 503 U.S. at 308 (Scalia, J., concurring in part and in the judgment) (the Court's "treatment of 'the venerable rule of lenity,' does not venerate the important values the old rule serves") (internal citation omitted). This debate is irrelevant here. The statute is ambiguous before and after application of all traditional tools of statutory construction so the rule of lenity should have been applied under all justices' views.

1. In *United States* v. *Farrell*, 126 F.3d 484 (3d Cir. 1997), the Third Circuit reversed a defendant's conviction under § 1512(b) for "corruptly persuading" a witness to withhold information from the Department of Agriculture. The court found "the phrase 'corruptly persuades' to be ambiguous," *id.* at 487, concluding that the meaning of "corruptly" was not discernible "from the face of the statute," the legislative history, or other statutes prohibiting obstruction of justice generally, *id.* at 487-90.

The government proposed that § 1512's "corruptly" element should be read to require only an "improper purpose," a definition used in some of cases interpreting the *mens rea* element of § 1503. The court, however, flatly rejected the argument that "corruptly" means "'motivated by an improper purpose'" for the purposes of § 1512(b). *Id.* at 489-90. The Third Circuit reasoned that § 1512(b)'s "knowing" element and specific intent requirement rendered the government's proposed construction of "corruptly" superfluous. *Id.* at 490 ("because the 'improper purposes' that justify the application of § 1512(b) are already expressly described in the statute, construing 'corruptly' to mean merely 'for an improper purpose' . . . renders the term surplusage, a result that we have been admonished to avoid"). Finally, the court explained that even if other more expansive readings of § 1512 were reasonable, the rule of lenity demanded a strict construction of the statute. *Id.* at 489 (citing cases).

In *United States* v. *Poindexter*, 951 F.2d 369 (1991), the D.C. Circuit held that the word "corruptly," as used in the former § 1505, "on its face . . . is vague; that is, in the absence of some narrowing gloss, people must 'guess at its meaning and differ as to its application.'" *Id.* at 378 (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)). The court explained that "corruptly" has both a transitive and intransitive meaning, the former involving the persuasion of another by means of corruption or bribery while the latter

involves persuading wickedly or immorally, that is, with a bad motive. *Id.* The court adopted the transitive meaning to avoid unconstitutional vagueness and concluded that even that reading "would still be unconstitutionally vague" without the additional requirement that the defendant "violate [a] legal duty." *Id.* at 379 (emphasis omitted). Further, the court found that the text failed to satisfy the notice rationale for the rule of lenity set forth in *Bass*, 404 U.S. at 348. See 951 F.2d at 386 ("neither the legislative history nor the prior judicial interpretation of § 1505 supplies the constitutionally required notice that the statute on its face lacks").[5]

In *United States* v. *Davis*, 183 F.3d 231 (3d Cir.), *amended by* 197 F.3d 662 (3d Cir. 1999), the Third Circuit revisited the meaning of "'corrupt persuasion'" in § 1512, and again expressly recognized that a jury instruction defining "corruptly" as "'having improper motive or purpose'" was erroneous. 183 F.3d at 250 & n.6. Relying on *Farrell* and *Poindexter*, the court reiterated that the government's "improper purpose" interpretation of "corruptly" renders the term unlawfully vague. *Id.* at 249-50. Specifically, the *Davis* court adopted, in the § 1512(b) context, *Poindexter*'s conclusion that "corruptly" needed to be accorded a transitive meaning to avoid unconstitutional vagueness. See *id.* at 249.

By adopting a transitive meaning of "corruptly" including a heightened *mens rea* requirement to avoid vagueness, *Davis* and *Poindexter* embrace the lenity principle.

2. The Second, Fifth and Eleventh Circuits have acknowledged that § 1512's "corruptly" language is not clear-cut, but they have nonetheless elected to interpret the statute expansively. In *United States* v. *Thompson*, 76 F.3d 442, 452

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[5] After *Poindexter*, Congress amended § 1515 to redefine "corruptly" as used in § 1505. *See* Pet. 18 n.19. The amendment provided "the term 'corruptly' means acting with an improper purpose." 18 U.S.C. § 1515(b). Congress conspicuously applied that new definition *only* to § 1505, notwithstanding that §§ 1503 and 1512 also use "corruptly."

(2d Cir. 1996), the Second Circuit held that § 1512(b) was not "unduly vague," assuming without significant discussion that § 1512(b) uses "corruptly" to mean that the government must prove defendant's attempts to persuade were motivated by an "improper purpose."[6] Similarly, in *United States* v. *Shotts*, 145 F.3d 1289 (11th Cir. 1998), the Eleventh Circuit rejected a vagueness challenge to § 1512(b) and endorsed both *Thompson*'s discussion, *id.* at 1300, and the *Farrell* dissent as its rationale. See *id.* at 1300-01. The court below thus joined the Second and Eleventh Circuits in "defining 'corruptly' in terms of improper purpose *despite the dim light it casts upon its meaning, its circularity aside*." App. 19a (emphasis supplied).

The courts that broadly interpret "corruptly persuades" rely on § 1512's legislative history and selected § 1503 case law to support the "improper purpose" interpretation. See *Farrell*, 126 F.3d at 492 (Campbell, J., dissenting); accord *Shotts*, 145 F.3d at 1300. The legislative history, however, is wholly indeterminate. Senator Biden's remarks relating to "corrupt persuasion" account for a few paragraphs in a lengthy section-by-section analysis of the Anti-Drug Abuse Act of 1988, and reveal only that the "corruptly persuades" language was intended to overrule a Second Circuit case and assure that non-coercive witness tampering could be prosecuted under federal law. See 134 Cong. Rec. 32701 (1988). Indeed, the definitional language introduced by the House Report, and

[6] In doing so, the Second Circuit applied its prior interpretation of § 1503 where it had approved of an "improper purpose" instruction, despite the different *mens rea* elements of that statute. *See Thompson*, 76 F.3d at 452 (citing *United States* v. *Fasolino*, 586 F.2d 939, 941 (2d Cir. 1978) (per curiam)). However, as purported further support for its application of the "improper purpose" standard, the Second Circuit also cited *United States* v. *Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981), *see Thompson*, 76 F.3d at 452, despite the fact that in interpreting § 1503's "corruptly" element, the Ninth Circuit held that the act had to "be done with *the purpose of obstructing justice*." *Rasheed*, 663 F.2d at 852 (emphasis supplied).

enacted as § 1515(a)(6), merely states the "term 'corruptly persuades' does not include conduct that is not 'misleading conduct' because a state of mind required for 'misleading conduct' is lacking." H.R. Rep. No. 100-169, at 12-13 (1987); *id.* at 13 n.27; see also 18 U.S.C. § 1515(a)(6) (implementing House language and defining "corruptly persuades" as used in §§ 1512 and 1513). Nowhere does the legislative history of § 1512 equate "corruptly" with an "improper purpose," or cite any § 1503 cases applying the *mens rea* element in those terms.[7]

In fact, even the Fifth Circuit ultimately did not find that the legislative history dictated its interpretation of "corruptly persuades," but instead opined that "defining 'corruptly' as 'motivated by an improper purpose' *comports easily* with the legislative history." App. 23a (emphasis supplied). In so holding, the court revealed its erroneous understanding of the rule of lenity. The rule of lenity requires a *restrictive interpretation* of a statute whose text and legislative history leave its meaning unclear. The fact that the legislative history is also consistent with a broader interpretation cannot justify the court's failure to apply the rule of lenity.

Like the other circuits adopting the "improper purpose" interpretation of § 1512(b), the Fifth Circuit broadly interpreted an ambiguous text and legislative history, embracing the harsher of two readings of a criminal statute although neither Congress's language nor its legislative history were "clear" or "definite." *McNally*, 483 U.S. at 359-60. The Fifth Circuit's failure to apply the rule of lenity here

[7] Not a single case cited in Senator Biden's discussion of "corrupt persuasion" mentions the phrase "improper purpose." *See* 134 Cong. Rec. at 32701 (citing cases); *cf.* Pet. 23 n.23 (discussing the cases' nexus to independently wrongful acts). To the contrary, *United States* v. *Lester*, 749 F.2d 1288, 1294 n.4 (9th Cir. 1984), stated "'the word "corruptly" as used in § 1503 means that the act must be done with the purpose of obstructing justice'" (alterations omitted) (quoting *Rasheed*, 663 F.2d at 852).

meant that the *mens rea* requirement in § 1512(b) could not fulfill its constitutionally-important functions in a setting where the conduct at issue was undertaken without consciousness of wrongdoing.

Indeed, the Fifth Circuit's "statutory inflation" of § 1512(b) "raise[s] concerns about both legislative primacy and due process." Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 Wm. & Mary L. Rev. 2209, 2262 (2003). Congress stated a *mens rea* requirement of "knowing" and "corrupt" persuasion, as well as the improper purpose of interfering with a proceeding. By failing to give the requirement of "corrupt" persuasion any content – let alone content more demanding than knowing persuasion – the Fifth Circuit authorized a prosecution not contemplated by the legislature. This approach contravenes the rule of lenity.

C. Further Percolation Is Both Inappropriate And Counter Productive Here.

There are three important reasons that further percolation of this issue in the lower courts is inappropriate.

First, the law must give notice of what conduct may be punished by criminal sanction. As this Court has explained, "'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'" *Bass*, 404 U.S. at 348 (quoting *McBoyle*, 283 U.S. at 27). It is difficult to reconcile the continuing tolerance of uncertainty about the meaning and implications of a vague statute and the due process imperative of clear and fair notice.

In addition, a continuing conflict in the scope of a criminal law simply stores up unfairness, trouble and confusion for courts in the future. As Justice Scalia has observed:

> In our era of multiplying new federal crimes, there is more reason than ever to give this ancient canon of construction [the rule of lenity] consistent application: by fostering uniformity in the interpretation of criminal statutes, it will reduce the occasions on which this Court will have to produce judicial havoc by resolving in defendants' favor a Circuit conflict regarding the substantive elements of a federal crime. [*Bryan* v. *United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting) (citing *Bousley* v. *United States*, 523 U.S. 614 (1998))].

Bousley was a case that the Court heard in order to sort out the consequences of *Bailey* v. *United States*, 516 U.S. 137 (1995), which resolved a circuit split about the meaning of the prohibition on the "use or carry[ing]" of a firearm in the commission of a crime. Once the Court resolved the split, substantial additional litigation ensued concerning retroactivity. This Court ultimately heard *Bousley* to resolve a circuit split over whether defendants who pled guilty could raise *Bailey* challenges on habeas corpus review. It held such challenges were available on habeas if defendants could show "'actual innocence.'" 523 U.S. at 623-24. *Bousley* illustrates the widening ripples of inter-circuit conflicts that percolate for any significant period and are resolved in defendants' favor. Because a defendant convicted by a jury that has been erroneously instructed on an element of a criminal offense can often plausibly plead actual innocence, the resolution of a circuit split can give rise to substantial issues related to the issuance of a writ of habeas corpus. In sum, the price for sustained inter-circuit conflicts about the meaning of criminal statutes is high, both for defendants swept in by overbroad interpretation and for the judiciary whose caseload is multiplied.

Finally, in a related point, as Justice Scalia noted in *Bryan*, the rule of lenity, properly understood and applied, should prevent circuit splits. If the courts of appeals faithfully applied the rule when ordinary tools of statutory construction resulted in ambiguity, there would be fewer differing

interpretations of criminal statutes. This case provides the Court with an opportunity to give needed instruction on this point.

For all of these reasons, the Court should decide this issue now, end the conflict, and clarify the important role played by the rule of lenity.

II. THE DECISION BELOW HAS SUBSTANTIAL DAMAGING IMPLICATIONS FOR THE ECONOMY AND INDIVIDUALS.

A. The Decision Below Criminalizes Supervision Of Legal Conduct And Creates Uncertainty And Inefficiency.

This was a high profile prosecution that destroyed a business and many professional careers. The legal message that this prosecution sent has not been lost on businesses and individuals. If a company or executive has any basis to believe that a formal government investigation may be commenced at some point in the future, continued compliance with a lawful document retention policy may result in criminal prosecution. Indeed, the uncertainty that has resulted from the prosecution and conviction of Andersen and the conflicting legal standards applied in the courts of appeals amplifies the uncertainty of businesses and individuals and results in unfairness to those prosecuted in different regions.

Criminal penalties are reserved for the most egregious conduct; moreover, unlike civil law penalties, criminal sanctions typically apply only to that conduct which society views as unambiguously wrongful. The Fifth Circuit's reading of § 1512(b) in this case, however, enters new territory, criminalizing conduct that was believed to be lawful and that consisted of reminding a subordinate to engage in wholly lawful conduct. See Pet. at 17-18. This point is illustrated by the following article's title: Steven Lubet, *Document Destruction After Arthur Andersen: Is It Still Housekeeping or Is It A Crime?* 4 J. App. Prac. & Process 323 (2002).

At the time of Andersen's alleged obstruction of justice, it was lawful and economically beneficial for Andersen to maintain a document retention policy and for Andersen employees to destroy documents in compliance with that policy. See Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 Fordham J. Corp. & Fin. L. 721, 721, 724-25 (2003) (discussing economic benefits of document retention policies). It was also lawful for a supervisor who discovered that employees were not complying with the document retention policy to destroy the documents him or herself. Under the Fifth Circuit's rule, however, it was illegal for that supervisor to suggest that employees observe the document retention policy if one object of the suggestion was to impede some future fact-finding by the government. This pushes an already severe form of vicarious corporate liability to an extreme. It is difficult to conceive of another area of the criminal law in which two individuals have precisely the same *mens rea*, and the one who acts is guilty of no crime, but the second who suggests that the first act *legally* is deemed to have engaged in illegal conduct.

The effects of this anomalous situation are severe for businesses and individuals. Companies and employees will be consumed by inefficient caution. If an official investigation even approaches the horizon, it will become impossible as a practical matter for a company to advise its employees to comply with its efficient and legal document retention policy for fear of running afoul of the law. In a company with thousands of employees which generates reams of paper, such an approach is onerous. For a small business, where space limitations, storage costs, and legal advice are relatively more burdensome, such a rule is even more oppressive. If Congress wants to impose those burdens and to criminalize failure to act in accordance with a federal rule of

document retention, then it should do so expressly and unambiguously. Absent that, prosecutors should not be invested with a roving commission to stretch criminal law to fit conduct not clearly prohibited. Only a faithful and consistent use of the rule of lenity can prevent the kind of needless harm that prosecution in this case created, and only this Court can restore the rule to its rightful place as a bulwark against oppressive government action.

B. The Conviction Of Andersen And Others Under Amorphous Standards Inflicts Significant Damage On The Economy.

Instead of prosecuting individual actors, the United States chose to prosecute Andersen, allowing the jury to spread blame for the ambiguous actions of a few across a corporate structure. By holding that Andersen violated § 1512(b) even though its document retention policy did not violate any independent legal duty, the prosecution was able to conflate legal and illegal acts, ultimately allowing the jury to punish a faceless corporation.

Multiple commentators opined that in the aftermath of Enron's collapse, government prosecutors were under intense pressure to obtain a symbolic conviction or find a scapegoat, and thus turned to Andersen because of the perceived ease in prosecuting obstruction of justice. See, *e.g.*, Jeffrey Toobin, *End Run at Enron: Why the Country's Most Notorious Executives May Never Face Criminal Charges,* New Yorker, Oct. 27, 2003, at 48 (a federal investigator stated that in Enron's aftermath, "'[w]e made Andersen our first case because it was easy and it was obvious'"). There is every indication that the government will continue to pursue corporate actors through quasi-vicarious liability in addition to, or in lieu of, individual prosecutions. See generally U.S. Dep't of Justice, Memorandum from Larry D. Thompson, Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm

(outlining the government's focus on federal prosecution of business organizations).

With a single stroke, and absent any showing of conduct that a reasonable person would know to be criminal, the government destroyed an important actor in a vital sector of the United States economy. As one commentator observed:

> [T]he attitude was Arthur Andersen got what it deserved.
>
> The question is: What is Arthur Andersen and *who* got what they deserved? You know, some secretary in Des Moines that doesn't have a job now or some junior auditor in Atlanta? I mean, that's who got punished. There is no such thing as Arthur Andersen and there is no such thing as Enron. You can't punish a legal entity.[8]

To be sure, enforcement of the obstruction of justice laws against corporations may serve the overall social good and benefit the economy by ensuring that shareholders are protected and markets remain competitive. In this case, however, an extravagant legal theory, tried and imposed without sufficient *mens rea* protections, irreparably damaged individual lives and American business. Andersen was eviscerated, because an incorrect and overbroad legal standard was applied. It may be too late to undo the damage to Andersen and its employees, but it is clearly not too late to prevent this mistake from being repeated.

This Court should clarify the reach of § 1512(b), so that individuals and businesses know what they must do to comply with the law on the obstruction of justice, and so that the courts of appeals generally understand the role of the rule of lenity in the interpretation of ambiguous criminal laws.

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[8] ABI Roundtable Discussion, *Remember When – Recollections of a Time When Aggressive Accounting, Special Purpose Vehicles, Asset Light Companies and Executive Stock Options Were Positive Attributes*, 11 Am. Bankr. Inst. L. Rev. 1, 10-11 (2003) (footnotes omitted) (emphasis supplied).

Without clarification of these rules, increasingly aggressive prosecutions of white-collar crime may inflict incalculable economic and intangible harm on businesses, their employees and their shareholders.

CONCLUSION

For all of these reasons, and those stated by petitioner, the petition should be granted.

Respectfully submitted,

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ARTHUR ANDERSEN LLP,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (Sept. 14, 2004)

Opinion of the United States Court of Appeals for the Fifth Circuit, *United States of America v. Arthur Andersen, LLP*, No. 02-21200 (5th Cir. rev. June 24, 2004).....1a

Memorandum Opinion, *United States of America v. Arthur Andersen LLP*, Crim. Action No. H-02-121 (S.D. Tex. May 24, 2002).....35a

RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Fifth Circuit

No. 02-21200

11/5/02	Direct criminal case docketed. NOA filed by Appellant Arthur Andersen LLP. [02-21200] (trm)
	* * *
1/17/03	Record on appeal filed. Vol(s) of Pleadings: 8 Vol(s) of Transcripts: 40 Exhibits: 3 boxes SEALED: 2 envs (1-PSI, Objections, Addendum & Recommendations) (1-Doc. #'s 19, 24, 54, 61, 89, 162, 163, 164, 192, 196, 197, 221 vol 10). [02-21200] ROA ddl satisfied. (rf)
	* * *
3/25/03	Appellant's Brief filed by Appellant Arthur Andersen LLP. Copies of Brief: 8 # of pages: 85 Word count: 20,894 Date of COS: 3/24/03 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [4139139-1] [02-21200] A/Pet's Brief ddl satisfied. E/Res's Brief due on 4/24/03 for USA. (tdb)
03/25/03	Record excerpts filed by Appellant Arthur Andersen LLP # of copies: 4 Sufficient [Y/N]: Y. [02-21200] (tdb)
	* * *

6/2/03	Appellee's Brief filed by Appellee USA. Copies of Brief: 8 # of pages: 114 Word count: 27,591 Date of COS: 5/27/03 Hand Delivered [Y/N]: n Disk Provided [Y/N]: y Sufficient [Y/N]: n Needs PDF brief on disk. [4207790-1] [02-21200] E/Res's Brief ddl satisfied. Reply Brief due on 6/16/03 for Arthur Andersen LLP. Sufficient Brief due on 6/12/03 for USA. (jca)
	* * *
6/12/03	Brief made sufficient by Appellee USA Replacement Disk Provided [Y/N]: y [02-21200] Sufficient Brief ddl satisfied. (rsm)
6/30/03	Reply brief filed by Appellant Arthur Andersen LLP. Copies of Brief: 7 # of pages: 59 Word count: 13,969 Date of COS: 6/27/03 Disk Provided [Y/N]: Y (2) Sufficient [Y/N] : Y. [4237440-1] [02-21200] Reply Brief ddl satisfied. (cpd)
	* * *
8/27/03	Case calendared for oral argument [02-21200] (pft)
	* * *
10/3/03	Supplemental authorities (FRAP 28 (j)) filed by Appellant Arthur Andersen LLP [4629955-1]. [02-21200] (pft)
10/9/03	Oral argument heard. Case argued by Maureen E Mahoney for Appellant Arthur Andersen LLP, Elizabeth D Collery for Appellee USA [02-21200] (pft)

6/16/04	Opinion filed. Issd in T form? y Mandate pull date is 7/7/04. [02-21200] (jma)
6/16/04	Judgment entered and filed. [02-21200] (jma)
6/21/04	Filing letter of counsel for Ms Nancy Temple dated 6/18/04 requesting to correct opinion [4867026-2] Sufficient [Y/N]: y [02-21200] (jma)
7/8/04	Mandate issued. Approved BOC Issued (Y/N)?: n [02-21200] Mandate pull date satisfied. (jca)
	* * *
9/20/04	Supreme Court notice that petition for certiorari was filed on 09/14/04 by Appellant Arthur Andersen LLP. Supct No.: 04-368 [02-21200] (cav)
1/14/05	Supreme Court order received granting petition certiorari [4946118-1] by Appellant Arthur Andersen LLP on 01/07/05. [02-21200] (cav)

U.S. District Court for the Southern District of Texas

No. 4:02-CR-00121-ALL

03/07/2002	1	INDICTMENT as to Arthur Andersen, LLP (1) count(s) 1 ,filed. (pgalvan) (Entered: 03/15/2002)
	* * *	
03/07/2002	3	MOTION by USA as to Arthur Andersen, LLP to seal indictment , filed. (pgalvan) (Entered: 03/15/2002)
03/07/2002	4	ORDER granting [3-1] motion to seal indictment as to Arthur Andersen, LLP (1) (Signed by Magistrate Judge Nancy K. Johnson), entered. Parties ntfd. (pgalvan) (Entered: 03/15/2002)
	* * *	
03/14/2002	5	MOTION by USA as to Arthur Andersen, LLP to unseal indictment , filed. (pgalvan) (Entered: 03/15/2002)
03/14/2002	6	ORDER granting [5-1] motion to unseal indictment as to Arthur Andersen, LLP (1) (Signed by Magistrate Judge Nancy K. Johnson), entered. Parties ntfd. (pgalvan) (Entered: 03/15/2002)

03/14/2002		Indictment unsealed as to Arthur Andersen, LLP (pgalvan) (Entered: 03/15/2002)
	* * *	
03/20/2002	10	Arraignment held before Magistrate Judge Calvin Botley Ct Reporter: ERO App: S Buell/A Weissman f/Govt;R. Hardin f/deft , filed., Plea of Not Guilty: Arthur Andersen, LLP (1) count(s) 1 Scheduling Order issued. ETT: 5 weeks (pgalvan) (Entered: 03/20/2002)
	* * *	
03/27/2002	17	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Pretrial conference Hearing for dates of 3/20/02 before Judge Harmon , filed. (Court Rptr: Dye) (ckrus) (Entered: 03/27/2002)
	* * *	
04/01/2002	23	JOINT Proposed Jury Questions with diskette by Arthur Andersen, LLP, USA , filed. (unsealed per order #146) (ckrus) (Entered: 05/30/2002)
	* * *	
04/26/2002	32	Proposed Jury Instructions by Arthur Andersen, LLP, filed. (unsealed per order #146) (ckrus) (Entered: 05/30/2002)
	* * *	

04/26/2002	41	Proposed Jury Instructions by USA as to Arthur Andersen, LLP, filed. (unsealed per order #146) (ckrus) Modified on 05/30/2002 (Entered: 05/30/2002)
04/29/2002	36	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Pretrial Conference Hearing for dates of April 26, 2002 before Judge Harmon , filed. (Court Rptr: Gayle Dye) (lbrown) (Entered: 04/29/2002)
		* * *
04/29/2002	37	IN LIMINE MEMORANDUM of Law by USA as to Arthur Andersen, LLP regarding evidentiary issues and jury instructions , filed. This document unsealed per Order #129. (khightower) (Entered: 05/23/2002)
		* * *
05/02/2002	52	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Pretrial Hearing for dates of April 29, 2002 before Judge Harmon , filed. (Court Rptr: Johnny C. Sanchez) (lbrown) (Entered: 05/02/2002)
		* * *
05/03/2002	56	RESPONSE by Arthur Andersen, LLP to [37-1] memorandum of law, filed. This document unsealed per Order #129. (khightower) Modified on 05/23/2002 (Entered: 05/23/2002)

		* * *
05/07/2002	69	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Hearing (Volume 1) for dates of 05/06/02 before Judge Harmon , filed. (Court Rptr: Johnny Sanchez and Gayle Dye) (khightower) (Entered: 05/07/2002
		* * *
05/08/2002	75	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 5/7/02 before Judge Harmon and a jury , filed. (Court Rptr: J Sanchez/G Dye) (Vol II) (pgalvan) (Entered: 05/09/2002)
		* * *
05/09/2002	87	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates 5/8/02 before Judge Harmon and a jury , filed. (Court Rptr: J Sanchez/G Dye – Vol. III) (pgalvan) (Entered: 05/10/2002)
		* * *
05/10/2002	93	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 5/9/02 before Judge Harmon and a jury , filed. (Court Rptr: J Sanchez/ G Dye) (pgalvan) (Entered: 05/13/2002)
		* * *

05/13/2002	94	TRANSCRIPT filed in case as to Arthur Andersen, LLP for ury Trial Hearing for dates of 5/10/02 before Judge Harmon and a jury, filed. (Court Rptr: J Sanchez/G Dye) (pgalvan) (Entered: 05/13/2002)

* * *

05/14/2002	99	MEMORANDUM of Law by USA to preclude evidence by deft Andersen that some employees acted without corrupt intent as to Arthur Andersen, LLP, filed. (pgalvan) (Entered: 05/14/2002)
05/14/2002	100	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 5/13/02 before Judge Harmon and a jury, filed. (Court Rptr: J Sanchez/G Dye) Vol. VI (pgalvan) (Entered: 05/15/2002)

* * *

05/15/2002	104	Response by Arthur Andersen, LLP to [99-1] Govt memorandum of law to preclude evidence that some Andersen employees acted without corrupt intent, filed. (pgalvan) (Entered: 05/15/2002)

05/15/2002	106	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Proceedings Hearing for dates of May 14, 2002 before Judge Harmon, filed. (Court Rptr: Johnny C. Sanchez and Gayle L. Dye) (lbrown) Modified on 10/23/2002 (Entered: 05/15/2002)

* * *

05/16/2002	108	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Proceedings Hearing for dates of May 15, 2002 before Judge Harmon, filed. (Court Rptr: Johnny Sanchez, Gayle Dye) (lbrown) (Entered: 05/16/2002)

* * *

05/17/2002	115	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 5/16/02 before Judge Harmon and a jury, filed. (Court Rptr: J Sanchez/G Dye) (pgalvan) (Entered: 05/20/2002)
05/17/2002	118	MOTION by USA as to Arthur Andersen, LLP for jury instruction, filed. (khightower) (Entered: 05/20/2002)

* * *

05/20/2002	116	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 5/17/02 before Judge Harmon and a jury, filed. (Court Rptr: J Sanchez/ G Dye) (pgalvan) (Entered: 05/20/2002)

* * *

05/20/2002	121	First Jury Corrspondence filed as to Arthur Andersen, LLP (khightower) (Entered: 05/21/2002)
05/21/2002	120	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 5/20/02 before Judge Harmon and a jury, filed. (Court Rptr: J Sanchez/G Dye) VOL. XI (pgalvan) (Entered: 05/21/2002)

* * *

05/22/2002	122	REPLY by USA as to Arthur Andersen, LLP to response to Govt In Limine Memorandum of Law regarding evidentiary issues and jury instructions , filed. (pgalvan) (Entered: 05/22/2002)
05/22/2002	124	Vol XII TRANSCRIPT filed in case as to Arthur Andersen, LLP for Proceedings Hearing for dates of 5/21/02 before Judge Harmon , filed. (Court Rptr: Sanchez and Dye) (ckrus) (Entered: 05/22/2002)

* * *

05/23/2002	125	Proposed Jury Instructions by USA as to Arthur Andersen, LLP , filed. (ckrus) (Entered: 05/23/2002)
05/23/2002	127	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 5/22/02 before Judge Harmon and a jury, filed. (Court Rptr: J Sanchez/G Dye - Vol XIII) (pgalvan) (Entered: 05/23/2002)
05/23/2002	128	Jury note No. 2 filed as to Arthur Andersen, LLP (pgalvan) (Entered: 05/23/2002)

* * *

05/24/2002	131	MEMORANDUM of Law by Arthur Andersen, LLP in opposition to the Govt proposal that the Court inform the jury that Andersen's employees have refused to testify as to Arthur Andersen, LLP , filed. (pgalvan) (Entered: 05/24/2002)
05/24/2002	132	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 5/23/02 before Judge Harmon and a jury, filed. (Court Rptr: J Sanchez/G Dye) VOL XIV (pgalvan) (Entered: 05/24/2002)

05/24/2002	134	MOTION by USA as to Arthur Andersen, LLP for jury instructions , filed. (ckrus) (Entered: 05/24/2002)
		* * *
05/24/2002	140	Rebuttal by Arthur Andersen, LLP to the Govt reply memorandum of law regarding jury instructions as to Arthur Andersen, LLP , filed. (pgalvan) (Entered: 05/29/2002)
		* * *
05/28/2002	136	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 05/24/02 before Judge Harmon , filed. (Court Rptr: Johnny Sanchez, Gayle Dye) VOL XV (khightower) Modified on 05/29/2002 (Entered: 05/29/2002)
05/28/2002	137	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 05/25/02 before Judge Harmon , filed. (Court Rptr: Johnny Sanchez) VOL XVI (khightower) (Entered: 05/29/2002)
05/28/2002	138	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 05/27/02 before Judge Harmon , filed. (Court Rptr: Johnny Sanchez, Gayle Dye) VOL XVII (khightower) (Entered: 05/29/2002)

		* * *
05/29/2002	147	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 5/28/02 before Judge Harmon and a jury , filed. (Court Rptr: J Sanchez/G Dye – Vol. XVIII) (pgalvan) (Entered: 05/29/2002)
		* * *
05/30/2002	159	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 5/29/02 before Judge Harmon and a jury , filed. (Court Rptr: J Sanchez/G Dye) – Vol. XIX (pgalvan) Modified on 05/31/2002 (Entered: 05/31/2002)
05/31/2002	160	ORDER on Govt Motions to Preclude Evidence of some Andersen employees acting without corrupt intent and evidence of "preserved bulk materials" as to Arthur Andersen, LLP (Signed by Judge Melinda Harmon), entered. Parties ntfd. Govt Motion to preclude evidence by deft Andersen that some employees acted without corrupt intent is GRANTED. It is further ordered that Govt Motion to preclude deft Andersen from introducing evidence regarding preserved bulk materials and the Ripepi E-mails is GRANTED. (pgalvan) (Entered: 05/31/2002)

	• • •	
05/31/2002	165	Declaration of Sharon Thibaut as to Arthur Andersen, L.L.P., filed. (khightower) (Entered: 06/03/2002)
05/31/2002	166	SUPPLEMENTAL MEMORANDUM OF LAW by Arthur Andersen, LLP to [32-1] jury instructions, filed. (khightower) (Entered: 06/03/2002)
05/31/2002	168	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 05/30/02 before Judge Harmon, (Court Rptr: Johnny Sanchez and Gayle Dye) (VOL. XX) (khightower) Modified on 06/05/2002 (Entered: 06/03/2002)
	• • •	
06/03/2002	170	STATEMENT by USA of position regarding Jury Instructions as to Arthur Andersen, LLP, filed. (khightower) (Entered: 06/03/2002)
	• • •	
06/03/2002	173	Vol XXI TRANSCRIPT filed in case as to Arthur Andersen, LLP for Proceedings Hearing for dates of 5/31/02 before Judge Harmon, filed. (Court Rptr: Sanchez and Dye) (ckrus) Modified on 06/04//2002 (Entered: 06/04/2002)
	• • •	

06/03/2002	175	RESPONSE by Arthur Andersen, LLP to [170-1] Govt statement of position regarding jury instructions, filed. (pgalvan) (Entered: 06/04/2002)
	• • •	
06/04/2002	177	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 06/03/02 before Judge Harmon, filed. (Court Rptr: Johnny Sanchez and Gayle Dye) (VOL. XXII) (khightower) (Entered: 06/05/2002)
	• • •	
06/05/2002	180	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 6/4/02 before Judge Harmon (Ct Rptr: J Sanchez/G Dye – Vol. XXIII) (pgalvan) (Entered: 06/06/2002)
	• • •	
06/05/2002	182	Certification of Exhibits to the Jury as to Arthur Andersen, LLP , filed. (pgalvan) (Entered: 06/06/2002)
	• • •	
06/05/2002	199	Court's Instructions to the Jury as to Arthur Andersen, LLP , filed. (ckrus) (Entered: 06/17/2002)

06/06/2002	186	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 6/5/02 before Judge Harmon and a jury, filed. (Court Rptr: J Sanchez/G Dye – Vol. XXIV) (pgalvan) (Entered: 06/06/2002)
		• • •
06/06/2002	185	#1 Jury notes filed as to Arthur Andersen, LLP unsealed per crd. (ckrus) (Entered: 06/17/2002)
06/06/2002	208	#2 Jury Notes and Court's Response as to Arthur Andersen, LLP (signed by Judge Melinda Harmon), filed. (ckrus) (Entered: 06/17/2002)
06/06/2002	209	#3 Jury Notes and Court's Response as to Arthur Andersen, LLP (signed by Judge Melinda Harmon), filed. (ckrus) (Entered: 06/17/2002)
06/06/2002	210	#4 Jury Notes and Court's Response as to Arthur Andersen, LLP (signed by Judge Melinda Harmon), filed. (ckrus) (Entered: 06/17/2002)
06/06/2002	211	#5 Jury notes filed as to Arthur Andersen, LLP (ckrus) (Entered: 06/17/2002)
		• • •

06/07/2002	212	#6 Jury notes filed as to Arthur Andersen, LLP (ckrus) (Entered: 06/17/2002)
		• • •
06/09/2002	213	#7 Jury Notes and Court's Response as to Arthur Andersen, LLP (signed by Judge Melinda Harmon), filed. (ckrus) (Entered: 06/17/2002
		• • •
06/12/2002	200	Court's Instructions to the Jury as to Arthur Andersen, LLP , filed. (ckrus) (Entered: 06/17/2002)
06/12/2002	214	#8 Jury notes filed as to Arthur Andersen, LLP (ckrus) (Entered: 06/17/2002)
		• • •
06/13/2002	215	#9 Jury Notes and Court's Response as to Arthur Andersen, LLP (signed by Judge Melinda Harmon), filed. (ckrus) (Entered: 06/17/2002)
06/13/2002	216	#10 Jury notes filed as to Arthur Andersen, LLP (ckrus) (Entered: 06/17/2002)
06/13/2002	217	#11 Jury notes filed as to Arthur Andersen, LLP (ckrus) (Entered: 06/17/2002)
		• • •

06/14/2002	203	MEMORANDUM by Arthur Andersen, LLP as to Arthur Andersen, LLP to Jury Note No. 9, filed. (ckrus) (Entered: 06/17/2002)
06/14/2002	218	#12 Jury notes filed as to Arthur Andersen, LLP (ckrus) (Entered: 06/17/2002)
		* * *
06/15/2002	205	JURY VERDICT as to Arthur Andersen, LLP Guilty: Arthur Andersen, LLP (1) count 1 , filed. (ckrus) (Entered: 06/17/2002)
06/15/2002	206	Special Verdict Form as to Arthur Andersen, LLP, filed. (ckrus) (Entered: 06/17/2002)
		* * *
06/15/2002	219	#13 Jury notes filed as to Arthur Andersen, LLP (ckrus) (Entered: 06/17/2002)
06/15/2002	220	#14 Jury notes filed as to Arthur Andersen, LLP (ckrus) (Entered: 06/17/2002)

06/19/2002		Duplicate copies of all exhibits admitted during the trial have been placed in 6 expandex folders and sent to the fileroom. All originals will be maintained by the Appeals section for appeal purposes as to Arthur Andersen, LLP , filed. (khightower) (Entered: 06/20/2002)
06/25/2002	222	MOTION by Arthur Andersen, LLP for Judgment of Acquittal , or for new trial , filed. (khightower) (Entered: 06/26/2002)
		* * *
06/27/2002	224	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Hearing for dates of 06/15/02 before Judge Harmon , filed. (Court Rptr: Johnny Sanchez) Vol. 25 (khightower) Modified on 06/27/2002 (Entered: 06/27/2002)
06/27/2002	225	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Hearing for dates of 06/14/02 before Judge Harmon , filed. (Court Rptr: Johnny Sanchez) Vol. 26 (khightower) Modified on 06/27/2002 (Entered: 06/27/2002)

06/27/2002	226	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Hearing for dates of 06/08/02 before Judge Harmon, filed. (Court Rptr: Johnny Sanchez) Vol. 27 (khightower((Entered: 06/27/2002)
06/27/2002	227	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Hearing for dates of 06/09/02 before Judge Harmon , filed. (Court Rptr: Johnny Sanchez) (khightower) (Entered: 06/27/2002)
06/27/2002	228	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Hearing for dates of 06/11/02 before Judge Harmon , filed. (Court Rptr: Johnny Sanchez) Vol. 30 (khightower) (Entered: 06/27/2002)
06/27/2002	229	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Hearing for dates of 06/12/02 before Judge Harmon , filed. (Court Rptr: Johnny Sanchez) Vol. 31 (khightower) (Entered: 06/27/2002)
06/27/2002	230	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Hearing for dates of 06/14/02 before Judge Harmon , filed. (Court Rptr: Johnny Sanchez) Vol. 33 (khightower) (Entered: 06/27/2002)

06/27/2002	231	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Hearing for dates of 06/13/02 before Judge Harmon , filed. (Court Rptr: Johnny Sanchez) Vol. 34 (khightower) (Entered: 06/27/2002)

* * *

06/27/2002	233	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial for dates of 6/10/02 before Judge Harmon and a jury , filed. (Court Rptr: J Sanchez) Vol XXIX (pgalvan) Modified on 06/28/2002 (Entered: 06/28/2002)
06/27/2002	234	TRANSCRIPT filed in case as to Arthur Andersen, LLP for Jury Trial Hearing for dates of 6/13/02 before Judge Harmon and jury , filed. (Court Rptr: J Sanchez – Vol. XXXII) (pgalvan) Modified on 06/28/2002 (Entered: 06/28/2002)

* * *

08/01/2002	236	MOTION by USA as to Arthur Andersen, LLP to strike the exhibits containing inadmissible post-verdict juror statements attached to [222-1] motion for Judgment of Acquittal, [222-2] motion for new trial , filed. (khightower) (Entered: 08/02/2002)

08/01/2002	237	MEMORANDUM by USA as to Arthur Andersen, LLP in opposition to [222-1] motion for Judgment of Acquittal, [222-2] motion for new trial , filed. (khightower) (Entered: 08/02/2002)
08/13/2002	238	RESPONSE by Arthur Andersen, LLP in support of [222-1] motion for Judgment of Acquittal, [222-2] motion for new trial , filed. (khightower) (Entered: 08/14/2002)

* * *

09/11/2002	242	MEMORANDUM OPINION AND ORDER as to Arthur Andersen, LLP granting [236-1] motion to strike the exhibits containing inadmissible post-verdict juror statements attached to [222-1] motion for Judgment of Acquittal, [222-2] motion for new trial as to Arthur Andersen, LLP (1), denying [222-1] motion for Judgment of Acquittal as to Arthur Andersen, LLP (1), denying [222-2] motion for new trial as to Arthur Andersen, LLP (1) (signed by Judge Melinda Harmon), entered. Parties ntfd. (khightower) (Entered: 09/11/2002)

* * *

10/10/2002	247	SEALED Confidential Sentencing Recommendation regarding Arthur Andersen, LLP to the Court, filed and placed in vault. (ksanders) (Entered: 10/11/2002)
10/10/2002	248	REVISED FINAL PRESENTENCE INVESTIGATION REPORT (Sealed) as to Arthur Andersen, LLP , filed. (ksanders) (Entered: 10/11/2002)
10/16/2002	250	Sentencing held before Judge Melinda Harmon Ct Reporter: K Metzger App: S Buell, A Weissmann, M Friedrich f/Govt; R Hardin, L Rubin, D McInerney f/deft. Arthur Andersen, LLP (1) count(s) 1 - 5 yrs probation, $500,000 fine, $400 special assessment , filed. (pgalvan) (Enterd: 10/22/2002)

* * *

10/21/2002	251	JUDGMENT as to , Arthur Andersen, LLP (1) count(s) 1 (Signed by Judge Melinda Harmon), entered. Parties ntfd. The Statement of Reasons has been placed under seal in the envelope with the Original Presentence Report. Copies of the SOR have been sent to the appropriate defense counsel, the AUSA, and the US Marshal. (pgalvan) (Entered: 10/22/2002)

10/22/2002	252	NOTICE OF APPEAL of judgment and sentence by Arthur Andersen, LLP (1) count(s) 1 FILING FEE $ not paid , filed. (jdavenport) (Entered: 10/23/2002)
10/23/2002		Notice of appeal and Copy of docket as to Arthur Andersen, LLP to USCA: [252-1] appeal. Parties ntfd. (jdavenport) (Entered: 10/23/2002)
		* * *
10/24/2002		USCA appeal fees received FILING FEE $ 105.00 RECEIPT # 525501 as to Arthur Andersen, LLP Re: [252-1] appeal Parties ntfd. (jdavenport) (Entered: 10/30/2002)
10/28/2002	256	Transcript Order Form received, advising transcript is already on file with the Clerk's Office; Pretrial Conference for dates of 03/20/02 and 04/26/02 before Judge Harmon as to Arthur Andersen, LLP , filed. (khightower) (Entered: 10/30/2002)
10/28/2002	257	Transcript Order Form received, advising transcript is already on file with the Clerk's Office; Pretrial Conference for dates of 04/29/02 before Judge Harmon as to Arthur Andersen, LLP , filed. (khightower) (Entered: 10/30/2002)

11/07/2002	258	TRANSCRIPT as to Arthur Andersen, LLP Re: Sentencing Hearing for dates of 10/16/02 before Judge Harmon , filed. Ct Reporter: Kathy Metzger (khightower) (Entered: 11/12/2002)
11/21/2002		USCA Case Number as to Arthur Andersen, LLP Re: [252-1] appeal USCA NUMBER: 02-21200 (fmremp) (Entered: 11/26/2002)
12/27/2002	259	SEALED TRANSCRIPT as to Arthur Andersen, LLP , filed. (khightower) (Entered: 01/06/2003)
01/14/2003		Certified and transmitted record on appeal consisting of 8 volumes of pleadings, 39 volumes of transcript and 17 envelopes of sealed pleadings to U.S. Court of Appeals as to Arthur Andersen, LLP: [252-1] appeal . Circuit No. 02-21200. Parties ntfd. (jdavenport) Modified on 01/14/2003 (Entered: 01/14/2003)
07/13/2004	260	JUDGMENT OF USCA (certified copy)for Arthur Andersen, LLP on June 16, 2004 Mandate Issued July 6, 2004 [252-1] appeal CCA No. 02-21200 affirming judgment/order Arthur Andersen, LLP (1) count(s) 1 , filed. (jdavenport) (Entered: 07/13/2004)

07/13/2004	261	Copy of Fifth Circuit Court of Appeals Opinion as to Arthur Andersen, LLP , filed. (jdavenport) (Entered: 07/13/2004)
		* * *
07/27/2004		Record on Appeal for Arthur Andersen, LLP returned from U.S. Court of Appeals: [252-1] appeal USCA No. 02-21200 consisting of 8 volumes of pleadings, 39 volumes of transcript, 17 envelopes of sealed pleadings and 3 boxes of exhibits, reassembled and forwarded to the file room. (jdavenport) (Entered: 07/27/2004)
07/28/2004	262	RECEIPT for Withdrawal of Original and copies of all Exhibits for Arthur Andersen, LLP , filed. (mmapps) (Entered: 07/28/2004)
08/04/2004	263	RECEIPT for Withdrawal of Exhibits for USA as to Arthur Andersen, LLP , filed. (mmapps) (Entered: 08/04/2004)
08/19/2004		Record on Appeal for Arthur Andersen, LLP returned from U.S. Court of Appeals: [252-1] appeal USCA No. (jdavenport) (Entered: 08/19/2004)

01/18/2005	264	The petition for a writ of certiorari filed with the Supreme Court has been granted. Court of Appeals Fifth Circuit Case No. 02-21200. United States Supreme Court Case no. 04-368 ,filed.(jdavenport,) (Entered: 01/18/2005)

GOVERNMENT'S EXHIBIT 160B

ARTHUR ANDERSON
October 31, 1999

AA BU POLICY STATEMENT

No. 780

Supersedes AW OM 83
Dated June 1, 1984

To: EACH ARTHUR ANDERSEN PARTNER, PRINCIPAL AND MANAGER

Subject: NOTIFICATION OF THREATENED OR ACTUAL LITIGATION, GOVERNMENTAL OR PROFESSIONAL INVESTIGATIONS, RECEIPT OF A SUBPOENA, OR OTHER REQUESTS FOR DOCUMENTS OR TESTIMONY (FORMAL OR INFORMAL)

1.0 BACKGROUND AND PURPOSE

1.1 The purpose of this Policy Statement is to address the procedures to be followed with respect to prompt notification of all litigation, investigation, and subpoena situations to the Arthur Andersen Legal Group ("AA Legal Group"). Section 2.0 outlines the process for notification of threatened or actual commencements of litigation, governmental and/or professional investigations. Section

3.0 outlines the process to be implemented upon receipt of subpoenas or other requests for documents or testimony.

1.2 Strict compliance with the following procedures is critical. Effective co-coordination and management of AA's defense and handling of subpoenas can only be achieved if the notification procedure is followed without exception. Without such prompt notification, AA may not be able to resolve or minimize problems before litigation is commenced and/or preserve all of its rights and options.[1]

2.0 PROCEDURES TO BE FOLLOWED REGARDING NOTIFICATION OF THREATENED OR ACTUAL LITIGATION, GOVERNMENTAL OR PROFESSIONAL INVESTIGATIONS

2.1 This section sets forth the notification procedures to be followed in those situations where professional practice litigation against AA or any of its personnel has been commenced, has been threatened or is judged likely to occur, or when governmental or

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[1] Although this Statement deals with matters relating to the Arthur Andersen Business Unit ("AA"), it is possible that certain notifications, subpoenas, etc. relating to AA may refer to Andersen Worldwide ("AW") or Andersen Consulting ("AC"). These should also be handled as set forth in this Statement, i.e., forwarded to the AA Legal Group. Upon receipt of these matters, the AA Legal Group will forward them on to the appropriate individuals at AW or AC.

professional investigations that may involve AA or any of its personnel have been commenced or are judged likely. This section also sets forth certain notification procedures to be followed if a payment is to be made (either in cash or in services, including fee adjustments) to resolve a problem situation with a client.

2.2 These procedures are also applicable if individual AA personnel are named in any threatened or pending litigation or investigation involving AA's professional practice. This Statement deals not only with professional practice matters (i.e., relating to AA's Service Categories: ABA, TLBA, BC and GCF), but also, with litigation involving administrative matters, including without limitation, fee collections.

2.3 Prompt notification to the AA Legal Group office that serves your Area[2] shall be made in the circumstances and in the manner described below in Sections 2.4 – 2.10.

2.4 Institution of Legal Action against AA or Its Personnel - Notification shall be made promptly to both the Chicago office of the AA

[2] For the Americas, contact the AA Legal Group in Chicago at (312) 931-4391 (Facsimile: (312) 462-8021)

For Asia/Pacific, contact the AA Legal Group in Hong Kong at 852-2853-9196 (Facsimile: 852-2543-9472).

For EMEIA, contact the AA Legal Group in Paris at 33-1-55-61-0994 (Facsimile: 33-1-55-61-0999).

Legal Group and the relevant Area office of the AA Legal Group along with a copy of the relevant court papers (e.g., summons and complaint, writ, statement of claim) whenever litigation is commenced against AA or AA personnel. This policy applies not only when AA is named as a defendant (either directly by a plaintiff, or by another defendant, i.e., as a third party defendant) but also when counterclaims are made against AA in actions brought by AA, as in an action for collection of fees.

2.5 Threatened Legal Action - Notification to the relevant Area office of the AA Legal Group as well as to the relevant practice director or their functional equivalent should also be made promptly whenever legal action against AA or AA personnel is threatened or appears imminent or likely. [Please refer to Exhibit 1 for examples of circumstances to be reported pursuant to this paragraph.]

2.6 Potential Institution of Legal Action by AA - Consultation with the relevant Area office of the AA Legal Group must be made prior to the commencement of any legal action by AA, including without limitation, an action for collection of fees.

2.7 Potential Settlement of Dispute in Absence of Litigation – Consultation with the relevant Area office of the AA Legal Group must be made prior to proposing an arrangement to

make either a cash payment or to provide free or reduced rate services (including fee adjustments) in order to resolve a practice problem. The tax aspects of a proposed arrangement involving a cash payment should be carefully reviewed with the appropriate HOTD and Tax Practice Director or their functional equivalent. In such a situation, the relevant Area office of the AA Legal Group must be involved since a properly prepared release in these types of situations is of great value to AA. As a general matter, AA will insist upon receiving a written release of any claims related to the practice problem prior to making a payment, agreeing to provide services or agreeing to forgive unpaid fees.

2.8 Governmental Investigations – Notification to the relevant Area office of the AA Legal Group should be made promptly when AA personnel become aware of investigations involving a client or former client and AA or any AA personnel, (e.g., investigations by a federal or state grand jury, the FBI, the Justice Department, the SEC or the IRS in the United States; the RCMP or the Department of National Revenue in Canada; the Department of Trade and Industry or the Inland Revenue in the United Kingdom, court-appointed receivers or liquidators and similar agencies in these or other countries). Where a subpoena is served upon AA to compel the attendance of AA personnel at a

hearing or deposition or for the production of documents in connection with such an investigation, the procedures set forth in Section 3.0 of this Policy Statement regarding receipt of a subpoena or other requests for documents or testimony must be followed.

2.9 Professional Investigations - Notification to the relevant Area office of the AA Legal Group should be made promptly when any professional society or regulatory body (such as the AICPA, a state CPA society, the ICAEW or similar professional society or any State Board of Accountancy or similar regulatory agency) investigation is commenced or threatened or a complaint is filed against AA or AA personnel.

2.10 Legal Action Relating to Charitable or Not-For-Profit Activities - Notification to the relevant Area office of the AA Legal Group should be made promptly when any AA personnel are named or threatened to be named as defendants in any action arising out of such person's service to a non-client charitable or not-for-profit organization.

3. PROCEDURES TO BE FOLLOWED REGARDING RECEIPT OF A SUBPOENA OR OTHER REQUESTS FOR DOCUMENTS OR TESTIMONY (Formal or Informal)

3.1 This section sets forth the process that each

country and office should have in place for handling service of (i.e., delivery) and response to a subpoena or other requests for documents or testimony, including requests or demands, whether informal or formal, from government agencies, stock exchanges or any other third parties (herein referred to collectively as "subpoena(s)") that are addressed to AA as well as those addressed to specific individuals.[3] This process applies to any and all such subpoenas - civil and criminal.[4] [5] [6]

[3] There are other AA policies that provide guidance regarding non-litigation-related requests for access to AA files. These policies and procedures are set forth in Chapter 1, Section 2 of Audit Objectives and Procedures ("AOP"). In responding to these types of requests for access to files, there is no need to consult with the relevant Area office of the AA Legal Group prior to providing access as long as the guidance set forth in Chapter 1, Section 2 of AOP are followed AND there is no threat of potential litigation or other potential problem associated with the release of files in these situations. If however, for any reason, you believe there to be any risk associated with the release of files in these situations, you should consult with the relevant Area office of the AA Legal Group prior to producing any documents.

[4] This Policy Statement applies to all subpoena served on AA or AA personnel including those related to Litigation Support and expert engagements as well as employee administrative matters.

[5] Prompt notification to the relevant Area office of the AA Legal Group is also critical in those unusual circumstances where demands for document and/or testimony are made in the form of search warrants or seizures, as well as those exceptional situations where arrest warrants for AA personnel are issued. Such requests and/or demands often require an office to comply immediately or at best in a relatively short time period. Every effort should be made to cooperate with government officials in these situations. At the same time, immediate notification to the relevant Area office of the AA Legal Group is critical in order for counsel to assess the situation and develop a strategy to properly respond to the demand.

3.2 Each office should establish a subpoena log in order to track and document pertinent information relating to each and every subpoena that is delivered, e.g., date and time the subpoena was served and accepted, the case name listed on the subpoena, the name of the individual who accepted service, the type of service (e.g., hand delivery, marshal's service, mail or courier), to whom and when the subpoena was circulated, the date when the subpoena was faxed to the relevant Area office of the AA Legal Group and information regarding confirmation that the subpoena was received and assigned to someone in the AA Legal Group. Exhibit 2 attached hereto is an example of such a log.

3.3 As part of this process, a person should be designated in each office as the individual who is authorized to accept service of subpoenas on behalf of AA for that office (the "authorized individual"). There should also be a "back up" individual designated who is also familiar with this process in the event that the authorized individual is absent from the office. It is important that the existence of the process and the identity of the authorized individual are properly communicated to everyone in the office,

[6] The procedures set forth in this Policy Statement apply to requests for AA historical information as well as policies and procedures when such requests are related to any situation covered by this Statement (e.g., materials contained in Research Manager, the AARD, Subject File Riders, training course lists or descriptions).

especially receptionists and other employees who may have a higher chance of contact with marshals or other process servers.

3.4 When a marshal or other process server attempts to serve a subpoena addressed to AA at one of our offices, the authorized individual should be notified immediately. The authorized individual (or the back-up designee) should be the ONLY person in that office authorized to accept service on behalf of AA. The authorized individual should not, under any circumstance, accept service of a subpoena that names a specific individual. In such a case, the named individual should be contacted immediately to accept service personally. If the named individual is not present, the process server should be advised of this fact. If the process server leaves such a subpoena despite being advised that the named individual is not present, written notation should be made of the circumstance.

3.5 Upon acceptance of a subpoena (whether accepted by the authorized individual or a person specifically named in a subpoena), notation should be made on the actual subpoena reflecting the date and time the subpoena was served as well as the identity of the person making the notation.

3.6 A copy of the subpoena should then be faxed promptly to the relevant Area office of the AA Legal Group, and circulated to the

Market Circle Leader, Office Managing Partner, relevant engagement partner, Practice Director or their functional equivalent, and the head of the practice in that office. The practice Director or their functional equivalent should consider the need to advise the Service Category Managing Practice Director or their functional equivalent. In certain countries, the Country/Regional Managing Partner may want to receive a copy.

3.7 After faxing the subpoena to the relevant Area office of the AA Legal Group, the authorized individual should follow-up by telephone or Lotus Notes with the relevant Area office of the AA Legal Group to confirm that the subpoena was received and that it has been assigned to someone for handling in the relevant Area office of the AA Legal Group. The authorized individual must receive positive confirmation of receipt and assignment from the relevant Area office of the AA Legal Group either via Lotus Notes, an Octel or a live conversation. All of this information should be recorded in the subpoena log so that the relevant information can be tracked both by the office and the AA Legal Group, if necessary.

4.0 No communication with anyone external to AA regarding receipt of the subpoena, including the related client and/or a client's internal or external counsel, should be made without prior consultation

with the relevant Area office of the AA Legal Group. Similarly, no action should be taken with respect to responding to the subpoena, including without limitation production of documents, agreeing to appear for testimony, etc., without prior consultation with the AA Legal Group.

5.0 The guidelines and procedures outlined herein constitute the controlling AA BU guidance relating to the subject matter of this AA BU Policy Statement. Any other guidelines or procedures established at the Area, Region or Country level, or with respect to a specific Service Category, are supplemental and should be issued as Country Supplements to this Policy Statement, subject to the approval process outlined in Policy Statement No. 110-2.

6.0 Any questions with respect to these procedures should be directed to the relevant Area office of the AA Legal Group.

7.0 REFERENCES:

AA BU PS No. 630 - Collection of Accounts Receivable
AA BU PS No. 690 - Serving as an Expert Witness
AA BU Audit Objectives and Procedures - Section 2
AA BU PS No. 720 - Risk Management
AWP No. 107 - Legal Counsel
AA U.S. ABA Bulletin No. 99-11 - Management of Sensitive Client and Professional Issues

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Managing Partner - AA BU
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Director of Litigation - Risk Management

APPROVED:

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Managing Partner - Global Risk Management

EXAMPLES OF SITUATIONS TO BE REPORTED

Any situation that may result in a claim being made against the Firm related to services provided to clients of the Firm previously or currently should be reported pursuant to Paragraph 2.5 of this Policy Statement. Examples of such situations include, but are not limited to, the following:

- notification from clients, third parties or their counsel threatening legal action against the Firm;
- serious oral threats from clients or third parties to make a claim against the Firm;
- oral indications from management or owners that the Firm was somehow responsible for the failure of operations or the failure to detect fraud;
- the subsequent discovery of material events that cause us to withdraw or amend a previously issued report or opinion; [handwritten bracket and asterisk in original]
- the restatement of prior financial results by an attest client;
- significant criticism, either oral or written, of the quality of our work for a client by:
    - regulatory authorities (i.e. securities commissions);
    - government officials or significant elected representatives;
    - other accountants
- seizure of client files by securities regulators or other government bodies;
- notices, warnings, disciplinary actions against the Firm partners or personnel regarding the quality of professional work;
- indications by management of insolvent/bankrupt enterprises, or guarantors of their debts, that they make take action against the Firm;
- the receivership/bankruptcy of a client subsequent to the issue of an auditors' report which did not include a going concern modification;

- Notice of Assessment or Re-Assessment in response to returns prepared / reviewed by the Firm where it appears that the Firm may have made an error;
- situations in which any taxation authority is proposing to, or has, assessed income or any other tax, or is denying a deduction or credit, contrary to prior advice given by us where that prior advice may now appear to be deficient in any way; and
- situations in which any taxation authority is suggesting that any representations made by us on behalf of a client are inaccurate, incomplete or misleading.

GOVERNMENT'S EXHIBIT 160A

ARTHUR ANDERSEN
February 1, 2000

AABU POLICY STATEMENT
NO. 760
Supersedes AW OMs 68, 87
101 and 123; ABA Bulletin 95-09
and Tax Bulletin 95094

TO: EACH ARTHUR ANDERSEN PARTNER, PRINCIPAL AND MANAGER

SUBJECT: CLIENT ENGAGEMENT INFORMATION - ORGANIZATION, RETENTION AND DESTRUCTION

1.0 BACKGROUND AND PURPOSE

1.1 The confidentiality and proper management of client engagement information is critical to the Arthur Andersen Business Unit (AABU). This Policy Statement describes our policies with regard to protecting the confidentiality of client information through its creation, active use to support or defend our work, and destruction.

1.2 The policies described in this memo relate to hard copy and electronic documents and files and client information used or produced by AA BU personnel in providing arranged services to clients. While the specific guidelines employed by service lines may vary based on the technologies employed, all current and future service lines should adhere to the guiding principles and policies described

herein. It is the responsibility of each service line and Service Category to create and maintain policies and procedures consistent with this Policy Statement.

1.3 Certain Service Categories and service lines may wish to adopt different retention guidelines based on local regulations, customs and practices, confidentiality agreements or other privileged protections and arrangements. If different guidelines are appropriate, it is the responsibility of the heads of these groups to obtain approval from the Managing Partner – Global Risk Management and communicate these different guidelines as appropriate.

1.4 More specific guidance can be obtained from other documents published or utilized by the AA BU relating to the use and confidentiality of client information such as the Personnel Reference Binder, Ethical Standards/Independence, Audit Objectives and Procedures and Service Category/Line Policies and Procedures.

2.0 EXECUTIVE SUMMARY

This Statement establishes critically important policies that enable us to protect confidential client information, retain it as needed to support or defend our work, and eliminate or destroy it when it is no longer needed. The following summarizes the significant policies expressed herein; however, it is necessary to read the entire Policy Statement for a complete understanding.

1. Material pertaining to <u>each engagement</u> will be contained in one central file (hard copy and/or

electronic). (Section 3.1)

2. This central file will not include any personal or gratuitous information. (Section 3.1)
3. Engagement information is the property of the AA BU and will not be copied or electronically transferred to personal files of any AA personnel. (Section 3.10)
4. The legal and professional requirements in each country will determine the type of material, and the retention period required for engagement files. These requirements may vary by service line. In the U.S., such files will be generally retained for six years (see Exhibit A). (Section 4.4)
5. Only final documents will be retained; drafts and preliminary versions of information will be destroyed currently. (Section 3.5)
6. Engagement material not to be retained permanently (see Exhibit A) will be destroyed after the required retention period, subject to the approval of the engagement partner or division head. (Section 4.5)
7. Deletion of information from electronic files will be accomplished in such a way that precludes the possibility of subsequent retrieval by AA personnel or third parties. (Section 4.6)
8. Voice messages recorded in Octel or other voicemail systems must be deleted monthly or sooner. (Section 4.1.2(d))
9. In cases of threatened litigation [previous two words circled in original], no related information will be destroyed. (Section 3.5.4)
10. Each country, office and service line should review their documentation, retention and destruction policies, assess where they are, develop a plan for getting into compliance with the principles of this Policy Statement, and

monitor compliance on an ongoing basis. (Section 3.8)

3.0 GUIDING PRINCIPLES

3.1 One Central Engagement File

3.1.1 Only one central file (electronic, hard-copy or combination) will be maintained for the storage of engagement and related documents. This central file will contain all information related to the engagement

3.1.2 Multiple copies of engagement documents should not exist. Each person needing access to engagement documents should follow a process to obtain documents from the central file. The central file should contain only that information which is relevant to supporting our work. It should not contain gratuitous comments or personal information.

3.1.3 At the end of the engagement, all electronic documents in all locations should be reviewed and any of continuing significance should be included in the central file area. All other documents stored in any other location should be deleted. The central file area should then be moved to a permanent storage area such as a CD and then deleted. This permanent media should be stored with the hard copy workpapers.

3.2 Compliance with Country and Governmental Regulatory Requirements

All our document retention and destruction practices should adhere to the applicable country, legal, professional and regulatory requirements. Should any of the policies in this statement violate such requirements, we should adhere to the applicable country legal requirements, and advise the Managing Partner – Global Risk Management of the departure from this policy.

3.3 Standard Classification and Indexing System

While no specific system is mandated, a well-designed system should use the same organization structure for both hard copy and electronic documents to facilitate retrieval and easy application of the retention/destruction policy.

3.4 Retain Only Essential information

3.4.1 Information gathered or considered in connection with performing client engagements should be evaluated by the engagement partner and manager, and only essential information to support our conclusions should be retained.

3.4.2 Management of each service line should develop and publish documentation standards indicating the types of information that should be retained.

3.4.3 It is the engagement partner's responsibility to assure compliance with these standards.

3.5 Timely Document Destruction

3.5.1 Engagement documents (in whatever form –

paper, electronic, voice) must be destroyed in accordance with the destruction guidelines set forth in Exhibit A.

3.5.2 The "central file" objective is crucial to accomplishing this objective, and to having confidence that it has been accomplished.

3.5.3 Information having relevance to our opinion or findings should be part of the central client engagement files. Drafts and preliminary versions of memos and reports, superseded workpapers, backup diskettes, and other types of information not in the central client engagement files should be destroyed when they are no longer useful to the engagement and no later than when the engagement is completed. Draft versions of documents should be discarded or deleted at the time the final document is completed. Individuals who create these drafts are responsible for destroying them. Exceptions to this may exist in situations where the pre-final versions are the working papers (the source documents for supporting our work) in which case they should be retained.

3.5.4 Engagement personnel may want to advise clients of our destruction policy in order to eliminate their reliance on our files for prior year information.

3.6 Appropriate Discarding of Confidential Information

3.6.1 Each office should have appropriate procedures for handling wastepaper that

ensure that wastepapers are securely handled after they leave the office and that confidential papers are burned, shredded or otherwise safely and completely destroyed.

3.6.2 For electronic files, appropriate techniques (such as "absolute delete") should be used to make sure the data cannot be reconstructed from the storage mechanism on which it resided.

3.7 Generic Form

Copies (or portions) of engagement-related documents that AA saves for research, template, risk management, training, best practices or other similar purposes must be saved in a generic manner – e.g., client names changed to fictional names ("ABC Corp"). This is to avoid inadvertently disclosing client information.

3.8 Compliance

3.8.1 Global Risk Management will be responsible for assuring compliance of each Service Category with this Statement. This may be accomplished through the practice review program, internal audit or other appropriate means.

3.8.2 Each country, office and service line should review their documentation, retention and distribution policies, assess where they are, develop a plan for getting into compliance with the principles of this Policy Statement, and monitor compliance going forward.

3.9 Local Procedures

The Director – Administration for each office is responsible for the implementation of a comprehensive file management program that includes systematically controlling files during their lifetime. This means proactively managing records a) at creation, b) during the active use and c) during destruction or movement to offsite retention facilities. This Statement generally refers to the "office" as the implementor of those policies; in some geographical areas, a country or a group of offices may be the responsible entity.

3.10 Personal Use of Client Information

It is a violation of AA BU policy for personnel to use or access client engagement materials, with no substantial business purpose. Engagement information is the property of Arthur Andersen, and will not be moved, copied or electronically transferred to personal files.

4.0 PROCEDURES

This section contains the following information and guidelines:

4.1 Indexing Workpapers, Reports and Electronic Information
4.2 Storage of Working Papers, Reports and Electronic Information
4.3 Highly Sensitive Information
4.4 Retention Guidelines
4.5 Destruction Guidelines
4.6 Suggestions for Deleting Electronic Data
4.7 Delay of Destruction

4.1 Indexing Workpapers, Reports and Electronic Information

4.1.1 Hard copy working papers and reports should be indexed by the Files Department of each office as they are received. The Files Department (Files) will assign an index code to each file.

(a) An index code is composed of two parts – the Firm client code (see Firmwide Client List), and a file number. The file number should consist, at a minimum, of the two digits of the year (e.g., 98 for 1998), plus a number serially assigned to each file received for that year. It maybe useful to assign additional code letters or numbers as a prefix or suffix to the file number to further distinguish the contents of the file (i.e., report, working papers, etc.), and/or the practice to which the file pertains. For instance, the first tax file received for 1998 tax work for XYZ Company, Inc., might be indexed XYZ123-TR981. This could indicate a 1998 tax return ("TR") file.

Once an office adopts a numbering system, it should be applied to all new files to establish uniform indexing.

(b) Where there is more than one file on an individual engagement, the partner, manager or senior may want the files indexed in a particular sequence which will be convenient for future reference.

To do this, all workpapers for that engagement should be sent to the File Department at the same time, accompanied by a listing of the files in the order in which file numbers are to be assigned to them. If the individual sending papers to the Files Department wishes to index them in advance, he or she may request that the Files Department reserve numbers for that purpose.

(c) Working papers and reports of associated entities are filed under their unique client code.

4.1.2 Electronic data should be indexed and stored as described below, or stored on appropriate storage media and included with the hard copy workpapers. The file covers on the hard copy files should indicate the location of any related electronic information.

(a) <u>Information Retained on the Network</u>

Information retained on the network should be filed by client.

All client files stored on a networked file server should be stored in a manner as follows: J:\division\client\year\filetype\ documents

If the network is accessible by multiple parties, the data should be stored in a manner as follows: J:\division\ptr\mgr\

client\year\filetype\documents

This standard format will facilitate locating documents and will ease identifying documents ready to be destroyed within the defined timeframe. It will also reduce the risk of duplicate copies or multiple versions that are accidentally retained.

Documents can be password protected, if appropriate, to help safeguard the information. In exceptional cases, data can be stored offline on disks or CDs to prevent access from unauthorized individuals.

(b) Information Retained on PC Hard Drives

All client files stored on PC hard drives should be indexed as follows: c:\data\client\year\filetype\documents

This information should be eliminated when it is no longer useful. At that time, the appropriate engagement documents should be stored on the network or on appropriate storage media filed with the hard copy workpapers.

(c) Information Retained on Engagement Site LANs

See Chapter 1, Section 2 of Audit Objectives and Procedures (AOP) for ABA policies regarding information on

ELAN.

(d) Information Retained on Voicemail

Any supporting documentation on voicemail should be converted to electronic or hardcopy memo and filed with the engagement documents. Accordingly, voicemails should not be retained for longer than 30 days.

(e) Complete Files Retained Together

All engagement items should be placed in the hard copy file at the time the file is submitted to the Files Department for storage. The hard copy file should be complete, including any electronic files. Only final versions of data should be stored in the file. Printed copies can substitute for electronic copies and e-mail.

4.2 Storage of Working Papers, Reports and Electronic Information

4.2.1 The following policies apply to the storage of working papers:

(a) Current files should be stored in the office before transfer to storage; older files may be placed in storage outside the office in space provided by the office building or in a public or rented warehouse. Local offices can determine the number of years to retain on site.

(b) Reasonable protection against fire and other hazards should be provided in storage areas by the use of metal doors, fire-retardant walls, or other devices.

(c) Appropriate listing and indexing of such files should be maintained to facilitate access to them when required.

(d) Once approved for filing by the engagement partner or manager, sign-out procedures should be established to control the access and location of such files.

(e) Appropriate procedures should be established to prevent unauthorized access to working papers in client locations, our office or in public storage. Such papers contain confidential information, and the integrity of that information must be maintained. Accordingly, client information should not be left overnight on desks, floors, etc.

(f) In-office storage areas should be securely locked after hours. Public or rented warehouse space should not be available to persons other than AA personnel or authorized warehouse employees as necessary to file or retrieve files.

4.2.2 Methods of storing network backup, archive and other related tape, are covered fully in the AA Admin Binder, and should be referred to when developing destruction

procedures for each location.

4.2.3 The following procedures ordinarily should be followed for the storage of electronic CDs or diskettes:

(a) CDs or diskettes will be used only for a specific client. Storing of multiple client datafiles on the same CDs or diskettes should be avoided.

(b) CDs or diskettes should be stored in our hard copy working paper files. For 8½ x 14 inch and other sized working paper files, a cardboard/vinyl diskette storage board should be used. For 8 ½ x 11 inch and other sized binders, vinyl holder inserts should be used. These supply items can be obtained through Central Purchasing.

(c) Each CD or diskette and any separate working paper files of printouts, etc., should be labeled with:
Client Name and Client Code
Fiscal Year-End or Period of Project
Project Name
Date of Last Update

(d) When backup copies of the CDs or diskettes and related documentation are deemed necessary, they should be stored offsite. If this is not practical, the backup copies should be kept in a separate protective cabinet outside of the General and/or Division file departments. These backup copies

should also be controlled and indexed.

4.2.4 The engagement partner is responsible for assuring that all unnecessary information is destroyed before storage of client files (hard-copy and electronic).

4.3 Highly Sensitive Information

Because all client information within our organization is considered confidential, attempts to classify such information by degree of confidentiality or to provide differing protective procedures generally are to be avoided. However, where unusually sensitive information is involved or when a client specifically requests that we exercise extra precaution with respect to the confidentiality of certain information, or where the files are subject to attorney-client or accountant-client privilege, the procedures detailed below apply:

(1) In most cases, the material in question should be placed in the regular files under seal and should be labeled indicating the restrictions on opening it.

(2) In rare and extreme cases (such as investigations of officers of companies, or in cases involving public personalities), the information relating to such investigations may be highly restricted so that only approved access to such information is permitted. In these situations, the AA BU "Secretary Files" can be used to restrict access to such data. Counterparts to the AA BU Secretary Files are maintained in each office under the

direction of the Office Managing Partner (OMP) so these files do not leave the individual office.

(3) When the AA BU Secretary Files are used for this purpose, the restricted information should be indexed "AA BU Secretary File C-8" for client files.

(4) When information or a file is deposited in the AA BU Secretary Files under such circumstances, the file should carry a label indicating:

(a) the name of the entity;

(b) a general description of the information;

(c) the names of partners and managers having knowledge of the material; and

(d) to whom and under whose direction such information can be disclosed.

(5) When highly sensitive information (as described above) is deposited in the AA BU Secretary Files of an office, a file front (in the case of working papers) or a report cover (in the case of a report) must be filed and indexed in our regular files without any contents except reference to the AA BU Secretary File. In most cases, the only document appearing in the regular files will be a copy of the letter to the AA BU Secretary Files. In this way, our regular files will include. a record of all papers and reports while at the same time providing methods by which access to their contents may

be completely restricted.

(6) In the case of files subject to the attorney-client or accountant-client privilege, Service Category specific procedures may apply.

The confidentiality of information entrusted to us should be conscientiously protected in all phases of our professional activities.

4.4 Retention Guidelines

4.4.1 When working papers are no longer needed to support or defend our work, they should be destroyed. As a general rule, all working papers should be retained for six years and then destroyed. This period is predicated upon legal statutes of limitations in the United States.

4.4.2 File retention requirements in the Service Categories and service logs are summarized on Exhibit A. The retention periods apply to both electronic and hardcopy information. Exhibit E contains policy suggestions for Electronic Data Retention. Each country management should determine if these exhibits should be revised for their practices. If different practices are appropriate, the Global Risk Management Group should be advised.

4.4.3 All client-related files, such as those containing correspondence, or other records and documents, should be retained until not useful. Material contained in client folders or other files maintained by individual

partners and managers should be purged, and out-of-date papers and information should be destroyed in accordance with the procedures established in this Statement. However, no client-related materials in any files should be retained more than six years unless the related working papers prepared in connection with a professional engagement for a particular client are also required to be retained. See 3.4.6 for exceptions for certain tax related matters.

4.4.4 Assurance and Business Advisory (ABA)

Generally, the purpose of preparing and retaining ABA working papers is to provide documentation and evidence in support of a professional report They should not be retained beyond the period of their usefulness for this function as set forth in Exhibit A. Historical information about a client's accounts and financial statements should be available from client records, and our working papers are not a proper permanent source of such data.

4.4.5 Tax, Legal and Business Advisory

Our Tax and Business Advisor (TBA) work involves much more than preparation and review of income tax returns. Accordingly, we impose on all our TBA services the same standards of practice that we prescribe for our income tax return engagements, except where those standards clearly have no application.

Tax working papers provide a medium to accumulate reference material necessary to provide documentation in support of tax work products such as tax returns, tax opinions, refund claims, protests, etc. They also provide support for decisions made regarding matters affecting a client's tax posture. Such working papers should not be retained beyond the period of their usefulness for these functions as set forth in Exhibit A. Historical information regarding such matters should be available from client records, and tax working papers are not a proper permanent source of such data. Positions taken and elections made on tax matters are evident from copies of the relevant tax work products themselves.

See Section 5 of "Tax and Business Advisory Services Policies and Standards – Worldwide for additional policies related to tax files and working papers and file contents.

Working papers, documents and files related to the Legal Practice will be retained according to the regulation, customs and practices of the legal profession in each country. Accordingly, the Country Tax and Legal Partner should prepare a country supplement outlining the policies to be followed. In this connection, it should be noted that many law firms retain client information until termination of their relationships and, in other cases, may destroy information shortly after completion of an assignment. See Legal Practice

Worldwide Bulletin – 97.04 for general standards of documentation.

4.4.6 Business Consulting and Global Corporate Finance (BC and GCF)

The major purpose of retaining BC and GCF working paper files is to provide documentation to support a recommendation made or conclusion reached on a particular engagement. Such papers should not be retained beyond the period of their usefulness for this function, as set forth in Exhibit A. Other material (e.g., copies of source documents, reports, and organization charts) should be left with the client or destroyed at the conclusion of the engagement unless they are a necessary part of that support.

4.4.7 Other Service Lines

Special considerations may apply to certain service lines and retention periods in certain lines may be requested by the client (particularly law firms) or the courts, in which cases the Global Risk Management Group should be advised.

4.5 Destruction Guidelines

4.5.1 The destruction of all working papers and electronic data must be accomplished in such a way as to prevent the data from falling into unauthorized hands and to prevent any possibility of reconstruction from partially destroyed files.

4.5.2 The procedures outlined below are to be followed with respect to the destruction of hardcopy working paper files. Cremation, shredding, mulching or pulping procedures are preferable. Where available, commercial facilities that are bonded and that provide proof of destruction should be used for destruction of records:

(a) Once each year, the Director – Administration in each office will initiate a comprehensive file listing, organized by service line, to be used with respect to ABA, TLBA, BC and GCF working papers which are anticipated to be destroyed under the normal retention policies set forth above.

(b) The Office Managing Partner or area Service Category Head is to issue a working paper file destruction memorandum (see Exhibit B) each year reemphasizing the BU retention polices and requesting each partner in the office to identify within 30 days any files among those anticipated to be destroyed which should be retained. <u>These exceptions must be approved by an area Service Category Head and be supported by sound reasons.</u> The memorandum will advise each partner as to where the comprehensive listing discussed in the preceding paragraph is available and reemphasize the relevant criteria discussed earlier in this Statement. As deemed necessary by the

Managing Partner Office (or Service Category Head), this circulation may include the partners transferred to other offices in recent years or engagement partners from referring offices.

(c) The Managing Partner – Office (or Service Category Head) is to determine the most practical means to make the comprehensive file listing available for partner review and to assure materials (if any) required to be retained under the policy guidelines set forth above are identified.

(d) Each partner is responsible for identifying materials to be retained (if any), and for responding to the working paper file destruction memorandum in writing (see Exhibit B), listing the files (if any) which should be retained, and the reason retention is appropriate.

(e) The Director – Administration will make arrangements for destruction of all materials not specifically identified for retention based on a review and compilation of all the partner responses and will coordinate any required follow-up procedures necessary to be certain <u>all</u> partners have responded.

(f) A responsible individual should check the files to be destroyed against the approved list, control the destruction process and prepare a summary of disposition of files (see Exhibit C) which

is to be retained permanently in the office.

4.5.3 The primary purposes for retaining electronic information on diskettes or networks are to support conclusions, to provide a backup to the copy left with the client or for use in creating subsequent year working papers, carryforward balances, etc. This information should not be retained beyond the period of its usefulness for these functions, as set forth above.

Electronic information should be retained for the same reasons and periods, and destroyed at the same time and in the same manner as hard copy working papers. Electronic data can exist in a number of different locations such as on local area networks, Lotus Notes, servers, ELANs, Zip drives, PCs, archive tapes, backup tapes and diskettes. Destruction procedures need to be considered for all such media within your local office, and the Director – Administration should make sure all necessary destruction takes place. While the procedures necessary will need to change periodically, paragraph 3.6 suggests steps to make sure this happens

The Director of Technology serving each office is responsible for developing procedures for destroying appropriate electronic data. Exhibit E shows the majority of current possible locations, along with suggestions for destruction techniques.

4.5.4 In the event the AA BU is advised of litigation or subpoenas regarding a particular engagement, the related information should not be destroyed. See Policy Statement No. 780 – Notification of Litigation.

4.6 Suggestions for Deleting Electronic Data

4.6.1 Establish a routine for "wiping clean" or destroying all tapes, disks and other media on which records reside that are not meant to be retained for future access – such that the data is not retrievable.

4.6.2 Servers, desktop computers and laptops should be regularly purged of all unnecessary data.

4.6.3 Stored Lotus Notes messages, documents, databases and bulletin boards must be erased in accordance with prescribed limits on retention of such records.

4.6.4 Retention of back-up and archived file server records must be limited to the required standards – as described in the AA Admin Binder. When tapes are "recycled" for future use, they must be effectively "erased" (using a bulk eraser or other effective method) so that the data is made unretrievable.

4.6.5 Retention rules regarding Personal Computer hard-drive documents, floppy disk back-ups, personal/desk files and home files must be complied with – these "off-line"

storage opportunities must be subject to similar discipline as the network system.

4.6.6 Subject files, Smart and WIN Smart files, Proposal Toolkits, the TIKTS database and other such specialty/research/training/ reference sources in the AA BU must be monitored and "purged" of material that relates to client engagements and has exceeded its normal retention period; if such materials have continuing usefulness, they should be made generic if they are to be retained.

4.6.7 Annual statements (Exhibit D) should be obtained from each person confirming that a) he/she has destroyed all extraneous files and documents regarding engagements worked on (or they have been generically retained in a particular specialty, research or reference database) and b) any client information that they have retained on their PC's, on disks or in other locations has been destroyed.

4.6.8 All other data storage areas on the network should be purged on a regular basis to aid in enforcing proper client files storage.

4.6.9 An AATS approved disk wiping utility should be used when computers are turned in for reassignment or disposal

4.6.10 Any diskettes stored with working papers should either be destroyed or reformatted ("absolute delete") at the same time the papers are destroyed. Diskettes or other

external storage media used offsite should be managed by the engagement manager or senior. Any client data that needs to be retained should be moved to proper storage areas on the office file server and the diskettes destroyed or reformatted. This should be done at the end of the job.

4.7 Delay of Destruction

4.7.1 The purpose of obtaining responses from the responsible ABA, TLBA, BC and GCF partners for all working paper files destruction is to assure proper consideration at the appropriate level of any reason why such files should not be destroyed and to synchronize the extended period of their retention if this is necessary. Reasons for extended retention might include regulatory agency investigations (e.g., by the SEC), pending tax cases, or other legal action in connection with which the files would be necessary or useful. In such cases, material in our files cannot be altered or deleted (See Policy Statement No. 780 regarding notification of litigation). Other reasons might include litigation involving AA or the client, the number of open tax years, the possible need for historical information regarding loss or credit carryovers, LIFO inventory calculations, or arrangements that may have been made with specific clients to retain working papers under special circumstances. In some cases, destruction may be delayed to conform with the period of retention required of the client for its records on a particular matter, if the period

exceeds our policy retention periods. [Paragraph marked with handwritten vertical line and asterisk in original.]

4.7.2 If, in the judgment of the engagement partner(s), any working paper files should not be destroyed, notation to this effect and a brief description of the reason(s) therefore should be made in responding to the destruction request. Such information should be included in the office's annual summary disposition report (see Exhibit C), which should be reviewed annually thereafter (or at such later date as may be designated by the responsible partner(s)) for reconsideration.

4.8 Any questions related to this Statement should be directed to the Global Risk Management Group.

5.0 REFERENCES

- Audit Objectives and Procedures – Section 2
- Ethical Standards / Independence – Chapter 1
- Tax and Business Advisory Policies and Standards – Worldwide
- Legal Practice Worldwide Bulletin No. 97-04
- AABU Policy Statement No. 780 - Notification of Litigation

ROBERT G. KUTSENDA
Managing Partner – Global
Risk Management

APPROVED:

RICHARD E. BOULTON
Managing Partner – Strategy & Planning

CLEMENT W. EIBL
Managing Partner – Finance and Administration

AABU Policy Statement No. 760 — Exhibit A September 30, 1999

Client Engagement Information
Retention Guidelines for U.S. Practice

The information below summarizes the required retention periods for the U.S. Therefore, these policies may require modification for differing legal and professional requirements in other countries and service lines. Factors (which vary materially by country and by service line) relevant to the retention or destruction of working papers and other material include:

Custom and practice
Regulatory and statutory requirements
Statute of limitations
Legal ownership of working papers and other materials

The result is that each country and each Service Category and service line (or even, in some cases, possibly sub-service lines) potentially have differing requirements with regard to the need, or requirement, to retain working papers and other materials. The only practical approach is for our policies and procedures to be developed country by country and service line by service line. Lacking such, the policies outlined in this exhibit should be followed.

The appropriate Managing Partner – Country, in consultation with local legal counsel, is responsible for initiating any such required modifications and submitting them to the Global Risk Management Group for approval and distribution. However, in no event shall the retention period be shortened from the periods mentioned below if the engagement relates to work performed for an office in another country. Only the information described below

AABU Policy Statement No. 760 — Exhibit A September 30, 1999

should be retained.

As discussed in par. 4.5.4 of AA BU No. 760, if advised of litigation or subpoena, no related information should be destroyed (see AA BU No. 780).

Service Line	Type of Material	Retention Period
ABA – Financial Statement Assurance	Client File (a)/Engagement Knowledge Base/CAF(purged annually of superceded or non-relevant documents)	()
	Audit Workpapers/Central File	Permanently (e)
	Office copies of reports and financial statements	Six years
	(d) Filings with Government agencies which include (physically or by reference) our reports, such as 10K's and Registration State-ments filed with the SEC	Permanently (e)
		Permanently (e)
ABA – Business Risk Consulting and Advisory	Central File, including Working Papers	When no longer useful or needed to support an opinion. Maximum of Six years (f).
	Office Copies of Reports (d)	Permanently (e)

AABU Policy Statement
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Exhibit A
September 30, 1999

Service Line	Type of Material	Retention Period
ABA – AA Process Solutions	Central File, including working papers (Enterprise Center Clients)	Six years (f)
	Office Copies of Reports and Financial Statements	Permanently (e)
	Filings with Government Agencies which include (physically or by reference) our reports, such as 10Ks and Registration state-ments filed with SEC CAFs	Permanently (e)
	Project File Documentation, including: • SMART documentation and risk management action plan • Job Arrangement Letter or Contract with appropriate terms • Contract change orders • Project work plans • Engagement QA partner review documentation • Project memoranda related to client discussions of issues/ problems and resolution	

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Exhibit A
September 30, 1999

Service Line	Type of Material	Retention Period
	• Supporting schedules, simulations, models, or other documentation that underlie final recommendations made or end products delivered • Client satisfaction documentation and survey forms	Six years (b)
TLBA – Tax and Business Advisory	Central File, including all Working Papers	Six Years (f)
	Income Tax Returns	Six Years (f)
	Tax Basis Studies	Permanently (e)
	Earnings and Profits Studies	Permanently (e)
	Estate Planning Studies	Permanently (e)
	Estate and Gift Tax Returns	Permanently (e)
	Office Copies of Attest Reports, including Third-Party Tax Opinions and Reports on Prospective Financial Information	Permanently (e)
	Continuing Tax Files (including all documents that have continuing importance)	Permanently (e)

Service Line	Type of Material	Retention Period
TLBA – Legal	Central File, Including Working Papers	Customs and practices of legal profession in each country. The policy should be determined by the Head of Legal Services and approved by the Area Practice Director of Legal Services.
	Office Copy of Report or Other Deliverable (d)	Permanently (e)
BC	Project File Documentation • Risk SMART documentation and risk management action plans • Job Arrangement Letter with appropriate terms and conditions, signed by the client and AA • Contract change orders • Project work plans • Engagement QA partner review documentation • Project status meetings	

Service Line	Type of Material	Retention Period
	• Project memoranda related to client discussions of issues/ problems and resolution • Supporting schedules, electronic simulations or models, and other documentation that underlie final recommendations made or end products delivered • Client satisfaction documentation and survey forms	Six Years (b)
	Office Copy of Final Report or Other Deliverable (d)	Permanently (e)
Complex Claims & Events (Litigation Support)	Project File Documentation, including • Documentation to support that an adequate conflict search was performed • Risk SMART documentation • Job Arrangement Letter with appropriate terms and conditions, signed by the client and AA • Contract change orders • AP-150, including sign-	

Service Line	Type of Material	Retention Period
	off by engagement QA partner • Client satisfaction documentation and survey forms • Retention of specific supporting schedules are required by (i) Class Action Settlement Assistance, (ii) Insurance Insolvency Consulting and (iii) FEHB Settlement Negotiations. Contact the respective service line leader for more information Office Copy of Final Report or Other Deliverable (d)	Six Years (b) Permanently (e)
Federal Government Contracts Consulting	In addition to the guidelines provided for BC, contracts with the U.S. Government require the retention of certain documentation pursuant to Federal guidelines. Contact the Office of Government Services (OGS) for more information.	As directed by OGS

Service Line	Type of Material	Retention Period
Other Service Lines	Central File, including Working Papers Office Copies of Reports (d)	Six years (b) Permanently (e)

THESE NOTES ARE IMPORTANT – PLEASE READ

(a) The client file is a continuously updated file and includes the reports to support the accept/retain decision, ExCEED, Understanding the Business, Assess Client Risk Controls and Determining and Managing Residual Risk Processes. Per Section 2 of AOP, the engagement team must retain certain reports from the client file in the current year workpapers; retention of other reports is optional.

(b) Six years from the date of the financial statements covered by an audit report or supplemental reports, or the date of issue of special reports on prospective financial information, or other deliverables.

(c) The Office/Country Managing Partner, in consultation with the Global Risk Management Group, may choose to extend the period, if appropriate. In no circumstances, however, should the retention period be lessened.

(d) If our arrangement letter with the client includes legal liability limitation language, such letter should be included with the office copy of our report.

(e) As described in Section 4 of AABU Policy Statement No. 760, these items do not need to be retained permanently for lost clients. These items should be

retained for six years after loss of client rather than permanently.

(f) Six years from the year-end of the relevant return unless a longer period is required by local law. However, if a return is under examination or in dispute, the relevant information should not be destroyed until final resolution or settlement.

WORKING PAPER DESTRUCTION MEMO SAMPLE

To: EACH PARTNER AND PRINCIPAL

Subject CLIENT INFORMATION (INCLUDING ELECTRONIC MEDIA) DESTRUCTION

ACTION REQURIED BY _____, 19___

AABU Policy Statement No. 760 which establishes guidelines for the retention, storage and destruction of working papers, requires that certain client documents be destroyed after six years. Therefore, hardcopy and electronic files prior to 19__ will be destroyed this year. This includes files requested to be retained at previous destruction periods. If you are aware of any files that fall before the above years which should not be destroyed, it is your responsibility to inform the Director – Administration of those files by _____, 19__. Working papers to be destroyed include electronic media relating to the destruction period.

Our coordinator of the Files Department has prepared a comprehensive listing of all files planned for destruction this summer. A copy of this listing is available (in some specified location, or possibly attached in smaller offices) for your review.

Exceptions to the destruction process are set forth in Exhibit A to AABU Policy Statement No. 760. Any exceptions to the destruction of information should be decided by the appropriate audit partner, or in the case of lost clients, by the Office/Country Service Category Head.

If you are not certain that the CAFs contain important information of continuing value, such as LIFO base computations, acquisition cost allocations, details of book/tax depreciation and other book/tax differences, etc., it is your responsibility to see that this information is placed in the CAF prior to authorizing destruction of the working papers.

In the Tax, Legal and Business Advisory Division, the materials which pertain to open IRS examinations or pending litigation (and similar matters discussed in Section 4 of AA BU Policy Statement No. 760) should not be destroyed. It is the responsibility of the appropriate partner to inform the Director – Administration of those files which must be retained.

Please review the attached Exhibit A and immediately determine what files, if any should not be destroyed. If you are not sure whether working paper materials fall within the above guidelines, please consult with your Service Category Head, Director – Administration or, in certain instances, with the Managing Partner – Professional Practice Litigation. If you have any other questions about these procedures, please contact the coordinator in the Files Department.

Each partner should complete, sign and date the attached form to signify concurrence with the planned destruction, or to specify those files to be temporarily retained. All forms should be returned to the Director - Administration by or before _____, 19___.

AABU Policy Statement No. 760 Exhibit B September 30, 1999

Your assistance and immediate action concerning this matter is appreciated.

_____

(Office/Country Managing Partner or Service Category Head, as appropriate)

Enclosure: Exhibit A of AA BU Policy Statement No. 760

AABU Policy Statement
No. 760

Exhibit B
September 30, 1999

FILES DESTRUCTION

To: DIRECTOR – ADMINISTRATION

Subject: FILES DESTRUCTION

From: _____

_____ I have read the files destruction memo dated _____ and am not aware of any files that should be retained, based on the file destruction guidelines.

_____ I have read the files destruction memo dated _____ and have listed below the file(s) that should be retained, based on the file destruction guidelines.

_____ _____
Signature Date

Files To Retain:

Client Name	CLIENT CODE	FILE NUM-BER	YEAR(s)	RETENTION REASON

AABU Policy Statement
No. 760

Exhibit C
September 30, 1999

SUMMARY OF ANNUAL DISPOSITION OF FILES
_____1999

FILE NUMBER

_____

YEAR	FILES TO BE DESTROYED	FILES TO BE RETAINED	FILES NOT LOCATED*

Prepared by: _____
FILES DEPARTMENT

Approved by: _____
Director - Administration
or Service Category Head

* Column will normally be blank. Engagement partners should be notified in situations where files are lost, and a memo should be prepared describing the steps taken to find the files.

AABU Policy Statement No. 760 — Exhibit D September 30, 1999

Annual Statement Regarding Destruction of Client Information

To: All Personnel

From: Service Category Head

Subject Destruction of Client Information Under Personal Control.

AABU Policy Statement No. 760 dated _____, 1999, establishes guidelines for destruction of client information both hardcopy and electronic. Each year, we confirm with all our personnel that they have followed the procedures, summarized below, to assure compliance with those guidelines. Please read the procedures below and return this statement to _____ confirming that you have complied with the procedures (for more detail, see Section 4 of the Policy Statement).

1. All personal network areas, ELAN areas; Lotus notes mailboxes and databases, computer hard drives and other electronic storage media under my control has been purged of any data over six years old (diskettes should be destroyed or reformatted using "absolute delete").

2. All files related to client work (except that currently in progress) have been transferred to the network or other appropriate storage

AABU Policy Statement No. 760 — Exhibit D September 30, 1999

location, and has been deleted from media under my personal control; and

3. All extraneous, duplicate or nonessential files and information have been deleted.

4. All Octel messages older than 30 days have been deleted.

_____ _____

Signed Printed Name

Policy Suggestions for Electronic Data Retention

Each office is responsible for developing its own procedures for destroying appropriate electronic data.

Electronic client documents and files can reside in a number of locations, including local office servers, regional servers, engagement site LANs, laptop computers and various portable storage media. Policies and procedures need to be in place and implemented carefully to ensure that all client files are accounted for and properly stored and destroyed according to Firm guidelines. Additionally, your policies should be reviewed with the appropriate Director of Technology to assure they are appropriate. Guidance from the AA AdminBinder should also be considered.

Below is a listing of possible electronic client document and file locations, the impact of their location and recommended policies for proper handling of these files. These policies will need to be somewhat different in each location, based on the

specific environment of that location.

Location	Risk	Recommended Policy
Local Office File Servers	Back up may result in data being maintained for longer periods of time than is appropriate. Data can be stored in multiple locations on the network, which increases risks that data is retained for inappropriately long time periods.	Refer to the AA Admin Binder for appropriate file back up procedures. It is important that only one control copy of files (on j:) be maintained. Files stored on the g: drive on the servers should be purged at the same time the c: drive purging takes place, since g: would contain only personal copies of the data and not necessarily be targeted for archival/retention.

Location	Risk	Recommended Policy
Lotus Notes Servers	Individual mail databases and other Lotus Notes databases, such as AA Online, reside on regional notes servers. These databases should never be the primary storage location for client files and information.	General Lotus Notes servers should be backed up in the same manner as local office network servers. Individuals should remove Lotus Notes mail items that contain client information as quickly as possible.
	DocMan is a Lotus Notes database designed to facilitate the management and storage of client workpapers and other electronic documents prepared in connection with an audit. All DocMan databases are placed on a special regional Notes server separate from all other Firm or local office developed databases. According to DocMan procedures, the current	Once the current year workpapers are archived, these archived tapes must be properly stored and marked for timely destruction in the same manner as local office file servers

Location	Risk	Recommended Policy
	year workpapers will be archived at the conclusion of each engagement. Since the DocMan Notes servers back-ups are handled regionally instead of at the local office of the engagement team, the regional administrator will be responsible for timely client data destruction.	
	Proposal Toolbox is a database that contains "Best Practices" copies of actual proposals that have been submitted. These proposals contain information about potential clients.	Replace the actual names of the companies with "ABC Company" and remove any other descriptions in the proposal documents that would identify the company.
Engagement Site LANs	Engagement Site LANs (ELANs) will use JAZ drives, zip drives or laptop computers (acting	Managers (or seniors) should, at the end of each engagement, retrieve or otherwise

Location	Risk	Recommended Policy
	as servers) for client document storage and back-ups. Duplicate copies or draft copies of these files are frequently left on individual laptop computers and typically not deleted until computers are turned in for reassignment, disposal or lease termination.	make sure that the only electronic files for that engagement are the final copies stored on the ELAN document storage device.
	Since ELANs often "travel" from client location to client location, the same document storage devices (zip drives or JAZ drives) will be used at several different client locations.	Managers (or seniors) should make sure that the floppy, zip or JAZ drive discs that contain the final client electronic files are collected and taken to the local office and filed with the client workpapers at the end of the engagement. Destruction of these discs should be performed following policy guidelines. All discs that

Location	Risk	Recommended Policy
		contain client electronic files that are not final should either be properly destroyed or securely deleted. Backups of permanent ELANs should be marked appropriately with the backup date and properly stored. These backups should be stored in a protected area and destroyed according to AA BU guidelines.
Individual Laptop Computers	Laptop computers can contain client documents in the c\data\client subdirectories. These files can be drafts or duplicates of final copies that exist either on the network server or ELANs and have been backed up to	No client documents should reside on an individual's computer if that individual is connected to a file server or an ELAN on a regular basis. After a client engagement is complete, and proper backups of final

Location	Risk	Recommended Policy
	tape or disc.	client workpapers have been performed, all client documents on a laptop must be deleted using the "absolute delete" utility.
	Archived and replicated copies of Lotus Notes databases reside in the c:\data\notes\ subdirectory. The potential exists for client information to reside in these locally stored databases.	The laptop user should regularly review laptop copies and archives of Lotus Notes databases for document retention/destruction purposes.
	When an individual switches laptops, care must be exercised when moving data from one laptop to another to assure that old client data is not kept.	The local offices should distribute yearly notices to all laptop users to "absolute delete" all client data that are a year or more old.
Word	Word processing	Word processing

Location	Risk	Recommended Policy
Processing Departments	departments may keep copies (both hardcopy and electronic) in addition to other copies that are maintained.	files should be reviewed annually for files that have met the destruction time frame.

GOVERNMENT'S EXHIBIT NT1009

...

Enron

TC Jan + Tim. 10/9/01.

Look-back rule?

Call SEC on no-name basis?

Issue Reiser's report? 20-aggregation method?

If PSG says not technically correct, restates unless SEC agrees.

- Highly probable issue. SEC investig.
- Enforcement PSG agmt, near. probab. will force a restmt. w/o PSG agmt., restmt + probability of charge of culpable C+D in 10(b).
  From subj of SC+D risk + 102(e). Senior people in same position.

[Either PSG or team is right.

If deals of type 2000 – add contemporaneously. This will supercede – incorrectly worded. Here is what we discussed

→ If other memos in 2000 still in draft.

Check our policy re incorrect doc?

(A) Discard + replace w/ 100 dtd.

(B) Dual date.

(C) [illegible]

GOVERNMENT'S EXHIBIT 1012A

To: David B. Duncan@ANDERSEN WO
CC:
BCC:
Date: 10/12/2001 08:56 AM
From: Michael C. Odom
Subject: Document retention policy
Attachments:

More help.

------Forwarded by Michael C. Odom on 10/12/2001 10:55 AM

To: Michael C. Odom@ANDERSEN WO
cc:
Date: 10/12/2001 10:53 AM
From: Nancy A. Temple, Chicago 33 W. Monroe, 50 / 11234
Subject: Document retention policy

Mike-
It might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy. Let me know if you have any questions.

Nancy

http://www.intranet.andersen.com/onefirm.nsf/content/ResourcesFirmwidePoliciesPolicy-ClientInformationOrganization!OpenDocument

GOVERNMENT'S EXHIBIT 1018B

To: David B. Duncan
CC: Michael C. Odom@ANDERSEN WO; Richard Corgel@ANDERSEN WO; Gary B. Goolsby@ANDERSEN WO

BCC:
Date: 10/16/2001 08:39 PM
From: Nancy A. Temple
Subject: Re: Press Release draft
Attachments: ATT8ICIQ; 3rd qtr press release memo.doc

Dave – Here are a few suggested comments for consideration.

- I recommend deleting reference to consultation with the legal group and deleting my name on the memo. Reference to the legal group consultation arguably is a waiver of attorney-client privileged advice and if my name is mentioned it increases the chances that I might be a witness, which I prefer to avoid.

-I suggested deleting some language that might suggest we have concluded the release is misleading.

-In light of the "non-recurring" characterization, the lack of any suggestion that this characterization is not in accordance with GAAP, and the lack of income statements in accordance with GAAP, I will consult further within the legal group as to whether we should do anything more to protect ourselves from potential Section 10A issues.

Nancy

To: Michael C. Odom@ANDERSEN WO, Richard Corgel@ANDERSEN WO, Nancy A. Temple@ANDERSEN WO, Gary B. Goolsby@ANDERSEN WO
cc:
Date: 10/16/2001 05:00 PM
From: David B. Duncan (Mailed by: Shannon D. Adlong)
Subject: Press Release draft

First draft of memo regarding press release discussion for your comments.

Memo

ANDERSEN

[illegible file name footer omitted]

Memo

ANDERSEN

To The Files

Draft

From David B. Duncan

Date October 15, 2001

Subject Enron Press Release Discussions

On Friday evening, October 12, 2001, I received a draft of Enron's anticipated press release regarding third quarter 2001 results which indicated Enron's intentions to record numerous charges against income for the quarter totaling approximately $1 billion on an after-tax basis. The charges were described as "non-recurring" in the draft.

Enron had sometimes used this description in past press releases. In such cases, we had always informed management that, although we understood that press releases were the Company's responsibility, we did not advise the use of "non-recurring" as a description and were concerned it could potentially be misunderstood by investors. We pointed out that such items are, more often than not, included in normal operating earnings in the GAAP financial statements. We also insisted that the Company not use such a description in public filings with which we may have some association (i.e., in 10-Q and 10-K MD&A information). Whether because of our views or otherwise, management has generally described these or

similar items as "Items Impacting Comparability in such public filings".

Because of the magnitude of the anticipated third quarter 2001 charges and because they were being described as "non-recurring" in the draft release, I shared excerpts of the draft with Mike Odom, Rich Corgel and Gary Goolsby of our practice risk management group.
After discussion with the above individuals on Sunday, October 14, I spoke with Rick Causey, Enron's Chief Accounting Officer, about the company's presentation approach. I told Rick that, while we recognized that press releases are solely the Company's responsibility, we had strong concerns that the presentation of the charges as non-recurring could be misconstrued or misunderstood by investors. Our advice was that the Company should consider changing the presentation or should otherwise undertake whatever procedures they might deem necessary, including the involvement of counsel. Rick acknowledged my advice.

On Monday, October 15, 2001, the night before the release, I inquired of Rick what procedures may have been performed. He responded that he had raised the issue internally and that the press release had gone through "normal legal review".

The release was issued early Tuesday, October 16, 2001, with essentially the original presentation.

cc: Mike Odom
Rich Corgel
Gary Goolsby

[illegible file name footer omitted]

Date October 15, 2001
Subject Enron Press Release Discussions
Page 2 of 1

To The Files

Draft

From David B. Duncan

Date October 15, 2001

Subject Enron Press Release Discussions

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similar items as "Items Impacting Comparability in such public filings".

Because of the magnitude of the anticipated third quarter 2001 charges and because they were being described as "non-recurring" in the draft release, I shared excerpts of the draft with Mike Odom, Rich Corgel and Gary Goolsby of our practice risk management group. and Nancy Temple of our legal group for advice regarding this situation.

After discussion with the above individuals on Sunday, October 14, I spoke with Rick Causey, Enron's Chief Accounting Officer, about the company's presentation approach. I told Rick that, while we recognized that press releases are solely the Company's responsibility, we had strong concerns that the presentation of the charges as non-recurring could be misconstrued or misunderstood by investors. I also informed him that we were aware of enforcement actions undertaken against companies by the SEC in cases where they believe such a presentation was materially misleading. Our advice was that the Company should consider changing the presentation or should otherwise undertake whatever procedures they might deem necessary, including the involvement of counsel, to ensure they did not consider the presentation to be misleading. Rick acknowledged my advice.

On Monday, October 15, 2001, the night before the release, I inquired of Rick what procedures may have been performed. He responded that he had raised the issue internally and that the press release had gone through "normal legal review".

The release was issued early Tuesday, October 16, 2001, with essentially the original presentation.

Date October 15, 2001
Subject Enron Press Release Discussions
Page 3 of 1

cc: Mike Odom
Rich Corgel
Gary Goolsby
Nancy Temple

GOVERNMENT EXHIBIT 1017B

[Seal Omitted]

IN REPLYING
PLEASE QUOTE
MFW-02400

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
FORT WORTH DISTRICT OFFICE
801 CHERRY STREET SUITE 1900
FORT WORTH, TEXAS 76102
PHONE: (817) 978-3821 FAX: (817) 978-2700

October 17, 2001

VIA FACSIMILE [(713) 853-3129] AND OVERNIGHT MAIL

Enron Corp.
Attn.: James V. Derrick, Jr., Executive Vice President and General Counsel
Andrew S. Fastow, Executive Vice President and Chief Financial Officer
1400 Smith Street
Houston, TX 77002-7369

RE: Enron Corp. (MFW-02400)

Dear Sirs:

The Fort Worth District Office of the Securities and Exchange Commission is hereby inquiring into Related Party[1] transactions involving Mr. Andrew S. Fastow,

[1] "Related Party," as used herein, shall mean any and all entities with which Mr. Fastow was affiliated and which were involved in transactions with Enron Corp.; the transactions are to include but not be limited to those referenced in Enron's Form 10-Q for the period ended June 30, 2001, and its May 1, 2001, proxy statement, and the entities are to include but not be limited to LJM2 Co-Investment, L.P., LJM Cayman L.P., and/or the "Partnerships."

Executive Vice. President and Chief Financial Officer of Enron Corp.[2]

In general, we wish to determine the nature and amount of the interests, profits, and losses of Enron and Mr. Fastow in the Related Party transactions. We therefore request that for any and all Related Party transactions, Enron and Mr. Fastow provide the following information or documents:

1. the organizational documents for the Related Parties (for example, articles of incorporation), including documents showing the members, partners (limited and general), shareholders or other investors in the Related Parties.

2. any offering materials used to raise funds for the Related Parties.

3. the documents, if any, setting forth the terms of the Related Party transactions.

4. the documents, if any, terminating the Related Party transactions.

5. the documents, if any, specifying Mr. Fastow's relationship to, responsibilities at, and compensation agreements with, each of the Related Parties.

6. an accounting of the amounts involved in each Related Party transaction, and showing Enron's

[2] Throughout, Enron Corp. or "Enron" means Enron Corp., its subsidiaries, and affiliates.

ultimate profit or loss on the transactions.

7. an accounting of Mr. Fastow's interests in each Related Party transaction, and showing his profits or losses with regard to the individual transactions, and with regard to his relationship as a whole with the Related Parties.

8. if not shown by the documents and accountings requested above, a schedule or other summary showing the dates of key events in each Related Party transaction, including the dates and amounts of any payments between the Related Parties and Enron.

9. a summary of the particular rationale for each Related Party transaction, summarizing Enron's reason for entering into each transaction, including how it expected to profit from each transaction, and what exposure, if any, the transactions created, avoided or hedged for Enron.

10. a summary from Mr. Fastow, explaining the reason the Related Parties entered into each Related Party transaction, including how they expected to profit and what exposures, if any, the transactions created, avoided or hedged for them.

We ask that you provide the requested information and documents no later than November 9, 2001, to Staff Attorney John C. Martin, at the address set forth above for the Fort Worth District Office of the Commission.

The Commission has not determined that the matters hereby under inquiry involve violations of the federal securities laws, and you should not take this inquiry as a reflection upon any person, company or security. You may, however, wish to bring the requests made in this letter

to the attention of your attorney.

Attached for your information and retention is SEC Form 1662 which contains important supplemental information. If you have any questions concerning this matter, you may contact John C. Marlin at (817) 978-6471.

Very truly yours,

Spencer C. Barasch
Associate District Administrator

/s/ John Martin

John C. Martin
Staff Attorney

Enclosures: As noted

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena

False Statements and Documents

Section 1001 of Title 18 of the United States Code provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

Testimony

If your testimony is taken, you should be aware of the following:

1. *Record.* Your testimony will be transcribed by a reporter. If you desire to go off the record, please indicate this to the Commission employee taking your testimony, who will determine whether to grant your request. The reporter will not go off the record at your, or your counsel's, direction.

2. *Counsel.* You have the right to be accompanied, represented and advised by counsel of your choice. Your counsel may advise you before, during and after your testimony; question you briefly at the conclusion of your testimony to clarify any of the answers you give during testimony; and make summary notes during your testimony solely for your use. If you are accompanied by counsel, you may consult privately.

If you are not accompanied by counsel, please advise the Commission employee taking your testimony whenever during your testimony you desire to be accompanied. represented and advised by counsel. Your testimony will be adjourned to afford you the opportunity to arrange to do so.

You may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's. If you are represented by counsel who also represents other persons involved in the investigation, the Commission will assume that you and counsel have discussed and resolved all issues concerning possible conflicts of interest. The choice of counsel, and the responsibility for that choice, is yours.

3. *Transcript Availability.* Rule 6 of the Commission's Rules Relating to Investigations, 17 CFR 203.6, states:

> A person who has submitted documentary evidence or testimony in a formal investigative proceeding shall be entitled, upon written request, to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees: *Provided, however,* That in a nonpublic formal investigative proceeding the Commission may for good cause deny such request. In any event, any witness, upon proper identification, shall have the right to inspect the official transcript of the

witness' own testimony

If you wish to purchase a copy of the transcript of your testimony, the reporter will provide you with a copy of the appropriate form. Persons requested to supply information voluntarily will be allowed the rights provided by this rule.

4. *Perjury.* Section 1621 of Title 18 of the United States Code provides as follows:

> Whoever . . . having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose. or certify truly .... willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true ... is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years or both ....

5. *Fifth Amendment and Voluntary Testimony.* Information you give may be used against you in any federal, state, local or foreign administrative. civil or criminal proceeding brought by the Commission or any other agency.

You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment to the Constitution of the United States, to give any information that may tend to incriminate you or subject you to fine, penalty or forfeiture.

If your testimony is not pursuant to subpoena, your appearance to testify is voluntary, you need not answer any question, and you may leave whenever you wish. Your cooperation is, however, appreciated.

6. *Formal Order Availability.* If the Commission has issued a formal order of investigation, it will be shown to you during your testimony, at your request. If you desire a

copy of the formal order, please make your request in writing.

Submissions and Settlements

Rule 5(c) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.51c), states:

> Persons who become involved in ... investigations may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation. Upon request, the staff, in its discretion, may advise such persons of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding. Submissions by interested persons should be forwarded to the appropriate Division Director, Regional Director, or District Administrator with a copy to the staff members conducting the investigation and should be clearly referenced to the specific investigation to which they relate. In the event a recommendation for the commencement of an enforcement proceeding is presented by the staff, any submissions by interested persons will be forwarded to the Commission in conjunction with the staff memorandum.

The staff of the Commission routinely seeks to introduce submissions made pursuant to Rule 5(c) as evidence in Commission enforcement proceedings, when the staff deems appropriate.

Rule 5(f) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.5(f), states:

> In the course of the Commission's investigations, civil lawsuits, and administrative proceedings, the staff, with appropriate authorization, may discuss with persons involved the disposition of such matters by consent, by settlement, or in some other manner. It is the policy of the Commission, however, that the disposition of any such matter may not, expressly or impliedly, extend to any criminal charges that have been, or may be, brought against any such person or any recommendation with respect thereto. Accordingly, any person involved in an enforcement matter before the Commission who consents, or agrees to consent, to any judgment or order does so solely for the purpose of resolving the claims against him in that investigative, civil, or administrative matter and not for the purpose of resolving any criminal charges that have been, or might be, brought against him. This policy reflects the fact that neither the Commission nor its staff has the authority or responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and representatives of the Department of Justice.

Freedom of Information Act

The Freedom of Information Act, 5 U.S.C. 552 (the "FOIA"), generally provides for disclosure of information to the public. Rule 83 of the Commission's Rules on Information and Requests, 17 CFR 200.83, provides a procedure by which a person can make a written request that information submitted to the Commission not be disclosed under the FOIA. That rule states that no determination as to the validity of such a request will be

made until a request for disclosure of the information under the FOIA is received. Accordingly, no response to a request that information not be disclosed under the FOIA is necessary or will be given until a request for disclosure under the FOIA is received. If you desire an acknowledgment of receipt of your written request that information not be disclosed under the FOIA, please provide a duplicate request, together with a stamped, self-addressed envelope.

Authority for Solicitation of Information

Persons Directed to Supply Information Pursuant to Subpoena. The authority for requiring production of information is set forth in the subpoena. Disclosure of the information to the Commission is mandatory, subject to the valid assertion of any legal right or privilege you might have.

Persons Requested to Supply Information Voluntarily. One or more of the following provisions authorizes the Commission to solicit the information requested: Sections 19 and/or 20 of the Securities Act of 1933; Section 21 of the Securities Exchange Act of 1934; Section 321 of the Trust Indenture Act of 1939; Section 42 of the Investment Company Act of 1940; Section 209 of the Investment Advisers Act of 1940; and 17 CFR 202.5. Disclosure of the requested information to the Commission is voluntary on your part.

Effect of Not Supplying Information

Persons Directed to Supply Information Pursuant to Subpoena. If you fail to comply with the subpoena, the Commission may seek a court order requiring you to do so. If such an order is obtained and you thereafter fail to supply the information, you may be subject to civil and/or criminal sanctions for contempt of court. In addition, if the subpoena

was issued pursuant to the Securities Exchange Act of 1934, the Investment Company Act of 1940, and/or the Investment Advisers Act of 1940, and if you, without just cause, fail or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, correspondence, memoranda, and other records in compliance with the subpoena, you may be found guilty of a misdemeanor and fined not more than $ 1,000 or imprisoned for a term of not more than one year, or both.

Persons Requested to Supply Information Voluntarily. There are no direct sanctions and thus no direct effects for failing to provide all or any part of the requested information.

Principal Uses of Information

The Commission's principal purpose in soliciting the information is to gather facts in order to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or rules for which the Commission has enforcement authority, such as rules of securities exchanges and the rules of the Municipal Securities Rulemaking Board. Facts developed may, however, constitute violations of other laws or rules. Information provided may be used in Commission and other agency enforcement proceedings. Unless the Commission or its staff explicitly agrees to the contrary in writing, you should not assume that the Commission or its staff acquiesces in, accedes to, or concurs or agrees with, any position, condition, request, reservation of right, understanding, or any other statement that purports, or may be deemed, to be or to reflect a limitation upon the Commission's receipt, use, disposition, transfer, or retention, in accordance with applicable law, of information provided.

Routine Uses of Information

The Commission often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate. Whether or not the Commission makes its files available to other governmental agencies is, in general, a confidential matter between the Commission and such other governmental agencies.

Set forth below is a list of the routine uses which may be made of the information furnished.

1. To coordinate law enforcement activities between the SEC and other federal, state, local or foreign law enforcement agencies, securities self-regulatory organizations, and foreign securities authorities.

2. By SEC personnel for purposes of investigating possible violations of, or to conduct investigations authorized by, the federal securities laws.

3. Where there is an indication of a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system *of* records may be referred to the appropriate agency, whether federal, state, or local, a foreign governmental authority or foreign securities authority, or a securities self-regulatory organization charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute or rule, regulation or order issued pursuant thereto.

4. In any proceeding where the federal securities laws are in issue or in which the Commission, or past or present

members of its staff, is a party or otherwise involved in an official capacity.

5. To a federal, state, local or foreign governmental authority or foreign securities authority maintaining civil, criminal or other relevant enforcement information or other pertinent information, such as current licenses, if necessary to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant or other benefit.

6. To a federal, state, local or foreign governmental authority or foreign securities authority, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

7. In connection with proceedings by the Commission pursuant to Rule 2(e) of its Rules of Practice, 17 CFR 201.2(e).

8. When considered appropriate, records in this system may be disclosed to a bar association, the American Institute of Certified Public Accountants, a state accountancy board or other federal, state, local or foreign licensing or oversight authority, foreign securities authority, or professional association or self-regulatory authority performing similar functions, for possible disciplinary or other action.

9. In connection with investigations or disciplinary proceedings by a state securities regulatory authority, a

foreign securities authority, or by a self-regulatory organization involving one or more of its members.

10. As a data source for management information for production of summary descriptive statistics and analytical studies in support of the function for which the records are collected and maintained or for related personnel management functions or manpower studies, and to respond to general requests for statistical information (without personal identification of individuals) under the Freedom of Information Act or to locate specific individuals for personnel research or other personnel management functions.

11. In connection with their regulatory and enforcement responsibilities mandated by the federal securities laws (as defined in Section 21(g) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(g)), or state or foreign laws regulating securities or other related matters, records may be disclosed to national securities associations that are registered with the Commission, the Municipal Securities Rulemaking Board, the Securities Investor Protection Corporation, the federal banking authorities, including but not limited to, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, state securities regulatory or law enforcement agencies or organizations, or regulatory law enforcement agencies of a foreign government, or foreign securities authority.

12. To any trustee, receiver, master, special counsel, or other individual or entity that is appointed by a court of competent jurisdiction or as a result of an agreement between the parties in connection with litigation or administrative proceedings involving allegations of violations of the federal securities laws (as defined in Section 21(g) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(g)) or the Commission's Rules of Practice, 17

CFR 202.1 *et seq.*, or otherwise, where such trustee, receiver, master, special counsel or other individual or entity is specifically designated to perform particular functions with respect to, or as a result of, the pending action or proceeding or in connection with the administration and enforcement by the Commission of the federal securities laws or the Commission's Rules of Practice.

13. To any persons during the course of any inquiry or investigation conducted by the Commission's staff, or in connection with civil litigation, if the staff has reason to believe that the person to whom the record is disclosed may have further information about the matters related therein, and those matters appeared to be relevant at the time to the subject matter of the inquiry.

14. To any person with whom the Commission contracts to reproduce, by typing, photocopy or other means, any record within this system for use by the Commission and its staff in connection with their official duties or to any person who is utilized by the Commission to perform clerical or stenographic functions relating to the official business of the Commission.

15. Inclusion in reports published by the Commission pursuant to authority granted in the federal securities laws (as defined in Section 21(g) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(g)).

16. To members of advisory committees that are created by the Commission or by the Congress to render advice and recommendations to the Commission or to the Congress, to be used solely in connection with their official designated functions.

17. To any person who is or has agreed to be subject to the Commission's Rules of Conduct, 17 CFR 200.735-1 *et seq.*,

and who assists in the investigation by the Commission of possible violations of federal securities laws (as defined in Section 21(g) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(g)), in the preparation or conduct of enforcement actions brought by the Commission for such violations, or otherwise in connection with the Commission's enforcement or regulatory functions under the federal securities laws.

18. Disclosure may be made to a Congressional office from the record of an individual in response to an inquiry from the Congressional office made at the request of that individual.

19. To respond to inquiries from Members of Congress, the press and the public which relate to specific matters that the Commission has investigated and to matters under the Commission's jurisdiction.

20. To prepare and publish information relating to violations of the federal securities laws as provided in 15 U.S.C. 78u(a), as amended.

21. To respond to subpoenas in any litigation or other proceeding.

22. To a trustee in bankruptcy.

Small Business Owners: The SEC always welcomes comments on how it can better assist small businesses. If you have comments about the SEC's enforcement of the securities laws, please contact the Office of Chief Counsel in the SEC's Division of Enforcement at 202-942-4530 or the SEC's Small Business Ombudsman at 202-942-2950. If you would prefer to comment to someone outside of the SEC, you can contact the Small Business Regulatory Enforcement Ombudsman toll free at 888-REG-FAIR. The Ombudsman's office receives comments from small businesses and annually evaluates federal agency

enforcement activities for their responsiveness to the special needs of small business.

GOVERNMENT'S EXHIBIT NT1029

* * *

BEST AVAILABLE COPY

TC Dan Kalb 10/29/11

If new leadership, full supplanting is [illegible] problem
Additional resources [illegible] being brought to bear
Communicate of
Audit Committee

Don't know re prior FYs.
Press release is huge issue.
Accurate as possible.
Counterparties /

What FYs?

Issues in this year. We're taking a hard look year & quarters. Big diff of prior year issues

Don't know enough to withdraw.
Careful re effective withdrawing

Newspaper v. allegations

Given all of allegs, we don't reaffirm, [illegible] leadership resolves. Certainly haven't withdrawn opinion

Not in a position to talk to you. Not pushed by re ongoing all issues - need time to sort out - not affirming but emphasis on time
[illegible]

What would [illegible] auditors' reaction be?

→ Forensic team – at counsel
will help w/ SEC + Jury.

Timing – very concerned.

Electronic paper files.

Drafting of transactions.

John Stewart explain transactions
Thea? →
Any other than 11 Apr Eff.

• • •

GOVERNMENT'S EXHIBIT 1030A

[Seal Omitted]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

October 30, 2001

BY FACSIMILE TO (202) 663-6363

William R. McLucas, Esq.
Charles E. Davidow, Esq.
Joseph K. Brenner, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

Re: *Enron Corp. (HO-9530)*

Dear Messrs. McLucas, Davidow and Brenner:

As discussed yesterday, the staff has serious concerns about the recent revelations regarding limited partnership transactions at Enron. The staff is especially concerned about Enron's apparent unwillingness to provide meaningful disclosure to the investing public about the nature of these transactions and the performance of these partnerships.

Accordingly, we advised you of the information we believe Enron should provide to the public in short order, certainly, no later than Monday, November 5, 2001. This

information, which should be provided in a form that a reasonable investor would find helpful and would understand, falls into the four following categories:

1. An explanation of the LJM and LJM2 limited partnership agreements and activities including an explanation of the relationships between Enron and the partnerships and the business purpose(s) of the relationships. In connection with this, there needs to be a better articulation of the assets and liabilities of the partnerships and the extent to which they were transferred from or payable to Enron then is determinable from the Related Party Transactions footnote in the December 31, 200010-K

2. A similar explanation for any other similar arrangements (with or without related party involvement) including an explanation of Enron's total involvement in similar arrangements.

3. An explanation of all transactions in which Enron officers or directors have an interest similar to Andrew S. Fastow's interests in LJM and LJM2.

4. An explanation of the $1.2 billion charge to shareholder equity including an explanation of why Enron was obliged to buy back common stock and whether, and if so how, the buy back related to hedging activities.

We look forward to Enron's prompt and candid attention to these issues.

Also, as discussed, we plan on meeting with Enron representatives who are in a position to explain these transactions by Monday, November 5, 2001.

Very truly yours,

/s/ Linda Chatman Thomsen

Linda Chatman Thomsen
Associate Director
Division of Enforcement

/s/ Charles D. Niemeier by nct

Charles D. Niemeier
Chief Accountant
Division of Enforcement

GOVERNMENT'S EXHIBIT 928B.2

Andersen
Legal Group

To: Duffy J. Wilson@ANDERSEN WO
cc:
Date: 05/31/2002 06:46 AM
From: Kerry A. Miller, Chicago 33 W. Monroe, 50 / 72072
Subject: Requested Documents 10/13/2001

Confidential – Attorney Work Product

SMARTCOUNSEL
INTRANET SERVER

CLASS C

Link Summary	Events	Tasks	Notes	Discussions
Budgets	Expend ($)	Time Keep	Documents	Settlements DB

Matter Description & Activity

External Client Name	ENRON CORPORATION
Matter Number	AA200 002325
Matter Status:	Open

Description of Circumstance and Contested Services:	(10/12/2001 Nancy A. Temple): Enron is a publicly held client of our Houston office. Beginning in December 1999 and continuing through 2000 Enron entered into a series of complex transactions involving four SPEs (special purpose entities) known as the Raptor entities. The general purpose of the transactions was to hedge risks associated with investments in high tech stocks and private ventures. Enron expects to announce a $1.3 billion charge in the third quarter which includes significant impairment of the notes reflecting the investments in the Raptor entities. We have concluded that the company's accounting method for potential impairment in the first and second quarters 2001 was incorrect and we are informing the client of that advice. We are reviewing acceptable alternatives and determining whether restatement is necessary. The team is consulting with PSG and risk management (Stewart, Ripepi, Neuhausen, Petersen of PSG; Goolsby, Geron, Corgel, Odom of risk management; others consulted are Rieger, Swanson, Goddard, Lowther (concurring reviewer; engagement partners involved are Duncan and Cash). A former Andersen employee at Enron complained about the original accounting for the Raptor entities to the Company's GC and Chairman. The company hired Vinson & Elkins to investigate and we are awaiting the outcome of that investigation before we sign off on the third quarter.

Prior Description of Circumstance and Contested Services:	
Current Matter Status:	
Prior Matter Status:	
Show All	
Last Note for Matter:	No note for this matter
Last Document for Matter:	No document for this matter
Last Event for Matter:	No event for this matter
Last Task for Matter:	No task for this matter
Type of Potential Claim:	Professional Practice – Government/Regulatory Inv.
Potential Cause of Action:	
Service Category: (For Services in Question)	ABA
Engagement Services Period (Date Range)	
From:	
To:	
Tolling Agreement:	
Agreement Period (Date Range)	
From:	
To:	

Legal Fees/Settlements/Loss Exposure

	Fees and Disbursements				
	Budget	Paid	Unpaid	Settlements	Total
Fiscal YTD (US $)	0	0.00	0.00	0.00	0.00
Since inception (U.S. $)		0.00		0.00	0.00
MLE Amount (US $)					
MLE Comments:					

Prior MLE and Comments

Resolution Information

Resolution Date:	
Resolution Description:	
Amount of Settlement (US $):	
Convert to Litigation	No

Internal Legal Team Assignments

Primary Internal Counsel:	Nancy A. Temple – ARTHUR ANDERSEN LEGAL GROUP (Chicago, Illinois)
Supporting Internal Counsel:	Donald Dreyfus – Arthur Andersen Legal Group (Chicago; Illinois)
AA Practice Director:	Odom, Michael C. (New Orleans; Louisiana)
Class C Oversight Partner:	

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Octel:	23-72518
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GMU Number:	0080
GMU Name:	Houston
LMU Number:	001
LMU Desc./Service Line	Audit-Energy
Engagement Partner/MGR(2):	Cash, Debra A. (Houston; Texas)
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Classification:	Manager
GMU Number:	0080
GMU Name:	Houston
LMU Number:	001
LMU Desc./Service Line	Audit-Energy

Other Contacts:	
Area/Region:	
Market Circle:	
Country:	
Office:	Houston

AA Counsel

Legal Administrative Information

Date Reported to Legal:	09/28/2001
Date Record Established:	10/12/2001
Review for Counsel:	
Date Sent to Warehouse:	
Warehouse Location:	

Insurance Reporting Information

Notified to Insurer:
Claim Date:
Description of Notification
Prior Insurance Notification
Insurance Claim Year:
Insurance Claim Number:
Insurance Reserves Est.

Accounting and Management Reporting Information

G/L Account for LF&S Cost Allocations:
G/L Account for Case Administration Time:
GMU# Bearing Legal Costs:
GMU Name Bearing Legal Costs:

Modification Audit Trail

entered by: Nancy A. Temple on 12-Oct-01 at 11:14 AM

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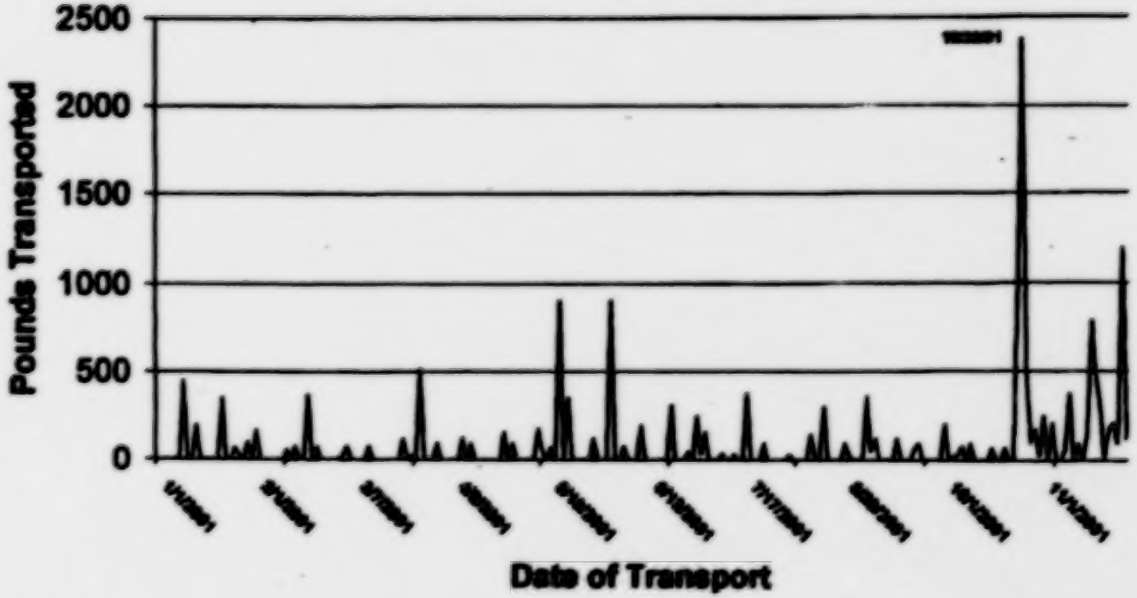
Duffy J. Wilson

GOVERNMENT'S EXHIBIT 180D

JA-133

City Central Courier Deliveries
January 2001 to November 2001



LRC:AW:SB

[CLERK, U.S. DISTRICT COURT]
[SOUTHERN DISTRICT OF TEXAS]
[FILED]
[3/7/02]
[MICHAEL N. MILBY, CLERK]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

----------X CRH-02-121

UNITED STATES OF AMERICA, INDICTMENT

-against

Cr. No. _____
(T. 18, U.S.C., §§ 1512(b) (2) and 3551 et seq.)

ARTHUR ANDERSEN, LLP,

Defendant.

----------X

THE GRAND JURY CHARGES:

I. ANDERSEN AND ENRON

1. ARTHUR ANDERSEN, LLP ("ANDERSEN"), is a partnership that performs, among other things, accounting and consulting services for clients that operate businesses throughout the United States and the world. ANDERSEN is one of the so-called "Big Five" accounting firms in the United States. ANDERSEN has its headquarters in Chicago, Illinois, and maintains offices throughout the world, including in Houston, Texas.

2. Enron Corp. ("Enron") was an Oregon corporation with its principal place of business in Houston,

Texas. For most of 2001, Enron was considered the seventh largest corporation in the United States based on its reported revenues. In the previous ten years, Enron had evolved from a regional natural gas provider to, among other things, a trader of natural gas, electricity and other commodities, with retail operations in energy and other products.

3. For the past 16 years, up until it filed for bankruptcy in December 2001, Enron retained ANDERSEN to be its auditor. Enron was one of ANDERSEN's largest clients worldwide, and became ANDERSEN's largest client in ANDERSEN's Gulf Coast region. ANDERSEN earned tens of millions of dollars from Enron in annual auditing and other fees.

4. ANDERSEN performed both internal and external auditing work for Enron mainly in Houston, Texas. ANDERSEN established within Enron's offices in Houston a work space for the ANDERSEN team that had primary responsibility for performing audit work for Enron. In addition to Houston, ANDERSEN personnel performed work for Enron in, among other locations, Chicago, Illinois, Portland, Oregon, and London, England.

II. THE ANTICIPATION OF LITIGATION AGAINST ENRON AND ANDERSEN

5. In the summer and fall of 2001, a series of significant developments led to ANDERSEN's foreseeing imminent civil litigation against, and government investigations of, Enron and ANDERSEN.

6. On or about October 16, 2001, Enron issued a press release announcing a $618 million net loss for the third quarter of 2001. That same day, but not as part of the press release, Enron announced to analysts that it would reduce shareholder equity by approximately $1.2 billion. The market reacted immediately and the stock price of Enron shares plummeted.

7. The Securities and Exchange Commission ("SEC"), which investigates possible violations of the federal securities laws, opened an inquiry into Enron the very next day, requesting in writing information from Enron.

8. In addition to the negative financial information disclosed by Enron to the public and to analysts on October 16, 2001, ANDERSEN was aware by this time of additional significant facts unknown to the public.

- The approximately $1.2 billion reduction in shareholder equity disclosed to analysts on October 16, 2001, was necessitated by ANDERSEN and Enron having previously improperly categorized hundreds of millions of dollars as an *increase*, rather than a decrease, to Enron shareholder equity.
- The Enron October 16, 2001, press release characterized numerous charges against income for the third quarter as "non-recurring" even though ANDERSEN believed the company did not have a basis for concluding that the charges would in fact be non-recurring. Indeed, ANDERSEN advised Enron against using that term, and documented its objections internally in the event of litigation, but did not report its objections or otherwise take steps to cure the public statement.
- ANDERSEN was put on direct notice of the allegations of Sherron Watkins, a current Enron employee and former ANDERSEN employee, regarding possible fraud and other improprieties at Enron, and in particular, Enron's use of off-balance-sheet "special purpose entities" that enabled the company to camouflage the true financial condition of the company. Watkins had reported her concerns to a partner at

ANDERSEN, who thereafter disseminated them within ANDERSEN, including to the team working on the Enron audit. In addition, the team had received warnings about possible undisclosed side-agreements at Enron.

- The ANDERSEN team handling the Enron audit directly contravened the accounting methodology approved by ANDERSEN's own specialists working in its Professional Standards Group. In opposition to the views of its own experts, the ANDERSEN auditors had advised Enron in the spring of 2001 that it could use a favorable accounting method for its "special purpose entities."
- In 2000, an internal review conducted by senior management within ANDERSEN evaluated the ANDERSEN team assigned to audit Enron and rated the team as only a "2" on a scale of one to five, with five being the highest rating.
- On or about October 9, 2001, correctly anticipating litigation and government investigations, ANDERSEN, which had an internal department of lawyers for routine legal matters, retained an experienced New York law firm to handle future Enron-related litigation.

III. THE WHOLESALE DESTRUCTION OF DOCUMENTS BY ANDERSEN

9. By Friday, October 19, 2001, Enron alerted the ANDERSEN audit team that the SEC had begun an inquiry regarding the Enron "special purpose entities" and the involvement of Enron's Chief Financial Officer. The next morning, an emergency conference call among high-level ANDERSEN management was convened to address the SEC inquiry. During the call, it was decided that documentation that could assist Enron in responding to the

SEC was to be assembled by the ANDERSEN auditors.

10. After spending Monday, October 22, 2001 at Enron, ANDERSEN partners assigned to the Enron engagement team launched on October 23, 2001, a wholesale destruction of documents at ANDERSEN's offices in Houston, Texas. ANDERSEN personnel were called to urgent and mandatory meetings. Instead of being advised to preserve documentation so as to assist Enron and the SEC, ANDERSEN employees on the Enron engagement team were instructed by ANDERSEN partners and others to destroy immediately documentation relating to Enron, and told to work overtime if necessary to accomplish the destruction. During the next few weeks, an unparalleled initiative was undertaken to shred physical documentation and delete computer files. Tons of paper relating to the Enron audit were promptly shredded as part of the orchestrated document destruction. The shredder at the ANDERSEN office at the Enron building was used virtually constantly and, to handle the overload, dozens of large trunks filled with Enron documents were sent to ANDERSEN's main Houston office to be shredded. A systematic effort was also undertaken and carried out to purge the computer hard-drives and E-mail system of Enron-related files.

11. In addition to shredding and deleting documents in Houston, Texas, instructions were given to ANDERSEN personnel working on Enron audit matters in Portland, Oregon, Chicago, Illinois, and London, England, to make sure that Enron documents were destroyed there as well. Indeed, in London, a coordinated effort by ANDERSEN partners and others, similar to the initiative undertaken in Houston, was put into place to destroy Enron-related documents within days of notice of the SEC inquiry. Enron-related documents also were destroyed by ANDERSEN partners in Chicago.

12. On or about November 8, 2001, the SEC served ANDERSEN with the anticipated subpoena relating

to its work for Enron. In response, members of the ANDERSEN team on the Enron audit were alerted finally that there could be "no more shredding" because the firm had been "officially served" for documents.

THE CHARGE: OBSTRUCTION OF JUSTICE

13. On or about and between October 10, 2001, and November 9, 2001, within the Southern District of Texas and elsewhere, including Chicago, Illinois, Portland, Oregon, and London, England, ANDERSEN, through its partners and others, did knowingly, intentionally and corruptly persuade and attempt to persuade other persons, to wit: ANDERSEN employees, with intent to cause and induce such persons to (a) withhold records, documents and other objects from official proceedings, namely: regulatory and criminal proceedings and investigations, and (b) alter, destroy, mutilate and conceal objects with intent to impair the objects' integrity and availability for use in such official proceedings.

(Title 18, United States Code, Sections 1512(b)(2) and 3551 et seq.)

A TRUE BILL

/s/ [Name Illegible]
FOREPERSON

JOSHUA R. HOCHBERG
ACTING UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF TEXAS

LESLIE R. CALDWELL
DIRECTOR, ENRON TASK FORCE

By: /s/ Samuel W. Buell
Samuel W. Buell
Andrew Weissmann
Special Attorneys
Department of Justice

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Caption Omitted in Printing]

ANDERSEN'S PROPOSED JURY INSTRUCTIONS

* * *

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. ___

Elements

For you to find Arthur Andersen guilty of the crime charged in the indictment, you must be convinced that the Government has proved each of the following things beyond a reasonable doubt:

First: That Arthur Andersen corruptly persuaded, or attempted to persuade, its employees to alter, destroy, mutilate, or conceal one or more objects; and

Second: That Arthur Andersen acted knowingly and with the specific intent and purpose to impair the objects' integrity or availability for use in a particular federal official proceeding; and

Third: That, at the time, this federal proceeding was ongoing or had been scheduled to be commenced in the future.

All of you must agree on the particular object or objects to have been altered, destroyed, mutilated, or concealed, and in which federal official proceeding or proceedings the object or objects were expected to be used.

Authority: 18 U.S.C. § 1512(b); Fifth Circuit Pattern Jury Instruction 2.68 (adapted); *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir. 1991) ("[w]ithout at least a circumstantial showing of intent to affect testimony at some particular federal proceeding that is ongoing or is scheduled to be commenced in the future, this statute does not proscribe [defendant's] conduct").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. ___

"Official Proceeding"

An "official proceeding" is a proceeding before a court, judge, or magistrate judge of the United States or a proceeding before a federal government agency that is authorized by law.

Here, the only official proceedings that may be considered are those charged in the indictment, which include "regulatory and criminal proceedings and investigations." For purposes of this case, a civil lawsuit brought by private litigants is not an official proceeding.

In addition, the official proceeding must be one that is ongoing or has been scheduled to be commenced in the future.

Authority: 18 U.S.C. §1515(a)(1); *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir. 1991) ("[w]ithout at least a circumstantial showing of intent to affect testimony at some particular federal proceeding that is ongoing or is scheduled to be commenced in the future, this statute does not proscribe [defendant's] conduct"); *United States v. Murphy*, 762 F.2d 1151, 1154 (1st Cir. 1985) (dismissing indictment that failed to specify the "official proceeding" obstructed); *United States v. Royal Caribbean Cruises, Ltd.*, 24 F. Supp.2d 155, 163 (D.P.R. 1997) ("[t]he government must notify the defendants of the specific proceeding which was obstructed.").

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. ___

SEC Inquiry

A formal investigation that has been set in motion by a vote of the Securities and Exchange Commission ("SEC") is an official proceeding. However, an informal inquiry conducted by SEC staff prior to official authorization by the Commission is not an "official proceeding." Thus, if you find that Arthur Andersen intended to impair an object's availability for use only in an informal SEC inquiry, you must find Arthur Andersen not guilty.

Authority: *United States v. Batten*, 226 F. Supp. 492, 493-494 (D.D.C. 1964); 17 C.F.R. § 202.5(a) ("in such preliminary [SEC] investigation no process is issued or testimony compelled").

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Caption Omitted in Printing]

ANDERSEN'S RESPONSE TO THE GOVERNMENT'S *IN LIMINE* MEMORANDUM OF LAW REGARDING EVIDENTIARY ISSUES AND JURY INSTRUCTIONS

* * *

The conclusion that a preliminary inquiry by the SEC is not an "official proceeding" is a sensible one. The SEC launches a vast number of preliminary inquiries, only a small percentage of which turn into enforcement proceedings. These inquiries thus do not trigger the kind of attention or alarm that would justify, for example, suspending a firm's document retention policies. To criminalize document destruction having an alleged nexus only with a preliminary SEC inquiry would thus encroach too severely on the document management practices of companies monitored by the SEC, while making the obstruction of justice statutes apply too broadly in this arena. As a consequence, Andersen's proposed instruction, which indicates that a formal investigation "set in motion by a vote" of the SEC is a "proceeding" but that "an informal inquiry conducted by SEC staff" is not (Andersen instr. at 6), correctly states the law; the Department's proposed instruction, which declares that "all of the steps and stages in the performance by an agency of its governmental functions" is a "proceeding" (DOJ instr. at 34-35), is plainly wrong.

b. The "official proceeding" must be "ongoing or scheduled" at the time of the corrupt persuasion.

In *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir. 1991), the Fifth Circuit stated that Section 1512 requires "at least a circumstantial showing of intent to affect testimony at *some particular federal proceeding that is ongoing or is scheduled to be commenced in the future.*" (emphasis added). That holding is not dictum, and it is binding on this Court. Accordingly, Andersen is entitled to an instruction reflecting the language in *Shively*.

In *Shively*, the defendants burned down their property to collect insurance proceeds. They made two threats in connection with the subsequent state court action instituted to recover the insurance. Five years after the arson, and two and one-half years after the Shivelys' threats, a grand jury indicted the Shivelys. The government proceeded on the theory that the threats were designed to prevent the potential witness from testifying honestly before any federal grand jury that might later be convened.

The court held that there was an insufficient nexus between the threats and the official proceedings to support a conviction. It stated:

> A defendant can act without knowledge of an official proceeding or its federal nature and, as a result, influence the witness's testimony at that proceeding. The coincidence of this act and result will not suffice, however, for criminal liability to attach under this statute. *Without at least a circumstantial showing of intent to affect testimony at some particular federal proceeding that is ongoing or is scheduled to be commenced in the future, this statute does not proscribe his conduct.*

927 F.2d at 812-13 (emphasis added). Thus, under *Shively*, it

is insufficient for the government to show that the defendant intended to affect some hypothetical future federal proceeding. The government must demonstrate instead that the defendant's acts were consciously directed toward a *specific* official proceeding that, if not yet commenced, is scheduled to begin in the future. The government's invitation to the Court to disregard this holding—which turns, in almost so many words, on the proposition that the Fifth Circuit did not mean what it expressly said (*see* DOJ Br. at 49)—is simply insubstantial.

Contrary to the government's argument, *Shively*'s construction of Section 1512 is wholly consistent with the statutory requirement that "an official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. 1512(e)(1). *Shively* simply requires that the proceeding, although not pending, be *scheduled and concretely planned*. *See United States v. Royal Caribbean Cruises, Ltd.*, 24 F.Supp.2d 155, 163 (D.P.R. 1997) ("[t]he government must notify the defendants of the specific proceeding which was obstructed."). The standard set forth in *Shively* is a perfectly reasonable construction of a statute that criminalizes conduct *because of its connection* to a federal official proceeding. *Cf. United States v. Aguilar*, 515 U.S. 593, 599 (1995) (construing 18 U.S.C. § 1503) ("We do not believe that uttering false statements to an investigating agent ... who might or might not testify before a grand jury is sufficient to make out a violation of the catchall provision of § 1503").

4. The "collective knowledge" doctrine has no place in this case.

a. There cannot be "collective specific intent."

The government is plainly wrong in seeking an instruction on "collective knowledge." *See* DOJ Br. at 52-52; DOJ instr. at 32-34. In fact, the collective knowledge doctrine simply has no application at all to cases involving specific intent offenses. The courts are *unanimous* in

holding that, even if the knowledge of corporate employees may be

> aggregated so that a corporate defendant is considered to have acquired the collective knowledge of its employees, ... *specific intent cannot be aggregated similarly*. Thus, in order for the verdict against [a corporate defendant] to stand, there must be evidence ... that at least one agent of [the defendant corporation] had the specific intent [required by the statute].

United States v. LBS Bank-New York, Inc., 757 F. Supp. 496, 501 n.7 (E.D. Pa. 1990) (citation omitted) (emphasis added.)[11] That is dispositive here because–as we have explained above an d as the

* * *

[11] Accord, *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996) (acts of employees "cannot ... be combined to create a wrongful corporate intent."); *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1435-36 (9th Cir. 1995) (rejecting securities fraud claim against corporation: "[T]here is no case law supporting an independent 'collective scienter' theory."); *Lind v. Jones, Lang LaSalle Americas, Inc.*, 135 F. Supp. 2d 616, 622 n.6 (E.D. Pa. 2001) ("Although knowledge possessed by employees is aggregated ..., specific intent cannot be aggregated similarly.") *First Equity Corp. of Florida v. Standard & Poor's Corp.*, 690 F. Supp. 256, 260 (S.D. N.Y. 1988) (in fraud case, "[a] corporation can be held to have a particular state of mind only when that state of mind is possessed by a single individual"), *aff'd* 869 F.2d 175 (2d Cir. 1989); *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*, 642 F. Supp. 781, 803 (E.D. La. 1986) (in RICO case, "to find [the corporate defendant] liable for fraud, I must find that a[n] ... employee had the specific intent required by 18 U.S.C. § 1341 and § 1343.")

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	:	Criminal Action
	:	No. H-02-121
vs.	:	Houston, Texas
	:	
ARTHUR ANDERSEN, LLP,	:	May 14, 2002
Defendant	:	8:12 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MELINDA HARMON
AND A JURY

Volume VII

* * *

[Testimony of David Duncan]

[1794]

* * *

Q. Now, during the days just before the earnings release, did the numbers start showing whether there would be less of an impairment issue than if the aggregation test was not applied and a restatement was called for under the old method?

A. Yes. **[1795]**

Q. And what did the numbers start showing?

A. Well, that the residual impact, if you will, was looking like it was not going to be material, but that was Enron's determination to make at that time until we were completely finished with all of our audit work.

Q. And who had the conversation from Arthur

Andersen to communicate the firm's position with respect to Enron?

A. I did.

Q. And who did you communicate that to?

A. I communicated that to Richard Causey, the chief accounting officer of Enron.

Q. When did you do that?

A. We were talking through the days leading up to earnings release, but we had a concluding conversation about that very early in the morning of earnings release.

Q. And when you say "very early in the morning of the earnings release," why don't we first pinpoint what day was the earnings release.

A. I believe the earnings release was on October 16th.

* * *

[1846]

* * *

Q. Prior to October 16th, 2001, did you think that the billion-dollar error was going to require restatement? **[1847]**

A. Prior to October 16th?

Q. Yes.

A. No, I did not.

Q. Why not?

A. We had discussed with the company their assertion that the error was not material enough to warrant a restatement.

Q. And what was your view about whether the billion dollars was material or not?

A. I was agreeable to the company's assertions that I believe that their assertions had merit.

Q. Why?

A. Why?

Q. Why? What was your reasoning?

A. Why, I'm sorry.

The company's assertions were, although it was a large amount, as a percentage of its balance sheet, particularly the equity balance, it was not a large percentage -- my recollection is it was approximately 8 1/2 -- and, also, that it did not significantly impact some of their more monitored ratios with respect to their balance sheets, including their debt-to-equity ratio, and had no impact on their financial covenants with their lenders.

Q. Did you think that that was an aggressive position for ENRON to take?

A. Yes, it was aggressive. [1848]

Q. And did you think your view was an aggressive position?

A. Yes, it was aggressive.

Q. And, in general, Mr. Duncan, if you had to characterize your own views as a monitor/auditor at Arthur Andersen, would you say you were aggressive?

A. Yes.

Q. Were there people at the firm who disagreed with you?

A. Often, yes.

Q. And did your own views change after October 16th, 2001 with respect to whether this needed to be -- would require restatement?

A. Yes.

Q. What changed after October 16th, 2001?

A. The more qualitative arguments around the lack of materiality of this issue did not -- no longer seemed to have merit after all of the negative press and the obvious attention on the issue by the analysts and the media.

Q. I'm sorry. I missed the last thing you said?

A. And the media.

Q. When you said the qualitative issues, what do you mean by that?

A. Well, typically, when you are evaluating any type of an error for a correction, you look at it in terms of

materiality, and you look at it both on a quantitative basis, which is purely a mathematical percent, if you will, of the [1849] balance or account that it is impacting; and you also look at it qualitatively to see if, notwithstanding the quantitative assessment, that, from a qualitative standpoint, would it significantly impact how readers viewed the financial statements.

Q. And did you change your views after October 16th, your own personal views about this issue?

A. Sometime after October 16th, yes, I did.

Q. Was that communicated to the company?

A. Yes, it was.

Q. Who did you communicate it to?

A. Rick Causey.

Q. Did you discuss the issue of the billion-dollar error with John Riley?

A. Yes.

Q. Do you remember about when you discussed it with Mr. Riley?

A. The week following the October 16th press release.

Q. And what did you say to him, and what did he say to you?

A. The discussion with Mr. Riley was in the context of a meeting with a number of other people where the issue was being discussed. And Mr. Riley was making the observations that, because the error was above the 5 percent threshold, that the SEC would view that as not passing any kind of a quantitative test. So you would be relying on the [1850] quantitative arguments. And, in this case, at the time we were discussing it, which was a week later, given the magnitude of the comments and attention, as I mentioned earlier, it was obvious to those of us in the group that the qualitative arguments no longer had merit. And Mr. Riley was expressing that view.

Q. And, at that point, did you agree with him?

A. Yes, I did.

* * *

[1879]

* * *

Q. After the analyst call, what did you and your colleagues, Ms. Cash, Mr. Bauer and Mr. Willard, talk about?

A. We discussed the call briefly. We discussed Deb's compilation of the LJM transaction listing. And she was soliciting all of our input into its completeness and who had worked on various transactions. And we discussed requests that I had gotten to make sure that we were in compliance with the document retention policy.

Q. What was said about that topic?

A. I mentioned that I had received a request to ensure that [1880] the engagement team was in compliance with the policy. Everybody acknowledged that that seemed to be a good thing to do. We talked about -- I suggested that everybody should contact their appropriate staff and make sure we're in compliance with the policy.

And someone suggested that they thought we should have a meeting to go over the recent events at ENRON and also to discuss becoming in compliance with the policy and have copies of the policy available for people that might not be familiar with it.

Q. You said someone suggested this in the larger meeting?

A. Yes.

Q. Do you remember who?

A. I believe it was Roger Willard.

Q. You also mentioned that you gotten a request on that.

A. Yes.

Q. When did you get a request on it?

A. I had gotten a request on October 12th.

Q. And how did you get that request?

A. They -- an e-mail that was forwarded to me from Mike Odom, the original e-mail being from Nancy Temple.

Q. And what was the -- in the e-mail?

A. What was in the e-mail was a statement to the effect that it would be a -- it would be good to ensure that the engagement team is in compliance with the document retention [1881] policy.

Q. Now, you said that in the discussion between you and Mr. Bauer, Mr. Willard and Ms. Cash, I believe you said something like it was agreed that would be a good thing to do.

A. Yes.

Q. Why?

A. Well, it appeared to be a very appropriate thing to do, given the R circumstances surrounding all the events at ENRON at the time.

Q. What circumstances?

A. The losses recorded in the quarter, the escalating news reports, the lawsuits and the potential for further lawsuits and the SEC inquiry.

Q. What did you understand when you brought up the topic of compliance with the document policy? What did you understand people would do to get in compliance with the policy?

A. I viewed the policy really having two main themes: One is the compilation of the final work paper product and the filing of that in the central files to where the working papers were preserved. And then the other broad aspect was the destruction of all other materials that didn't make it into the final work papers, extraneous notes and documentation and other things.

* * *

[1885]

* * *

Q. Now, the initial e-mail from Ms. Temple to Mr. Odom is October 12th; is that correct?

A. Yes.

Q. And if you could just read it, what it is that she says?

A. "Mike, it might be useful to consider reminding the engagement team of our document and retention policy. It will be helpful to make sure that we have complied with the policy. Let me know if you have any questions."

MR. HARDIN: Excuse me. I'm sorry. I think the witness misread. Can I ask him to reread the word "documentation"? I think it calls to document retention policy.

THE WITNESS: Okay.

MR. HARDIN: If you could read that sentence again.

THE COURT: All right.

THE WITNESS: Sure. "It might be useful to [1886] consider reminding the engagement team of our documentation and retention policy. It will be helpful the make sure that we have complied with the policy. Let me know if you have any questions."

BY MR. WEISSMANN:

Q. And the -- and then it's signed "Nancy"?

A. Yes.

Q. And there's a link there to the document policy?

A. Yes.

Q. Now, in that language, where it says "document retention

policy" and the whole initial e-mail --

A. Yes.

Q. -- is there any reference there to ENRON or the ENRON engagement team?

A. No, there is not.

Q. And Mr. Odom forwarded that to you; correct?

A. Yes.

Q. And he wrote "more help"?

A. Yes.

Q. How did you take that "more help" language?

A. As a sarcastic remark by Mr. Odom that we were getting a lot of advice on things to do around this time frame. And I took it as a pseudosarcastic remark by him of more things to do.

Q. Now, this e-mail is on October 12th. You said that you [1887] spoke about this with your colleagues right after the analyst call on the 23rd; is that correct?

A. Yes.

Q. What's the reason that you waited from the 12th to the 23rd?

A. The 12th was a Friday, the Friday before the earnings release, and we had a number of issues that were being managed through earnings release and afterward, and the opportunity and the -- by the time that certain time had passed, the recollection of complying with the policy didn't occur to me again until that point in time.

Q. Is there anything that made it more important to you on the 23rd than it was on the 12th?

A. Yes.

Q. What?

A. The continued escalating events surrounding ENRON.

Q. And what was escalating?

A. The negative press after the earnings release, the filing of lawsuits and the SEC inquiry.

Q. Now, you mentioned that people discussed right after the analyst call about this would be a good thing to do.

Why did you think it would be a good thing for the engagement team to be in compliance with the policy?

A. To protect the interests of the firm; to not have a lot of extraneous material that weren't -- materials that weren't [1888] a part of the final audit work papers laying around

for others to discover.

Q. And when you say "protect the interests of the firm," how would it protect the interests of the firm?

A. Well, in the event of civil litigation or investigation, things that were not a part of the final conclusions or work papers could be taken out of context, blown out of proportion, any number of reasons of how they might be used or misused against the firm.

Q. Did you have a discussion with Ms. Temple about that very topic?

A. Over time? At this particular date?

Q. No. At any point.

A. Yes. Over time, we had several references to that type of an item or an idea.

* * *

[1903]

* * *

Q. Now, Mr. Duncan, when you received the e-mail from Mr. Odom forwarding Nancy Temple's e-mail, did you personally have any concern about civil litigation?

MR. HARDIN: Excuse me. Ask him what his concerns were and I have no objection; but I object to the leading question.

THE COURT: Overruled.

BY MR. WEISSMANN:

A. Yes.

Q. Did you have any concerns about SEC involvement?

MR. HARDIN: Excuse me. I respectfully request an open-ended question what his concerns were not leading him as to specific.

THE COURT: Objection is overruled.

BY MR. WEISSMANN: [1904]

Q. You may answer the question.

A. Would you repeat it, please?

Q. Did you have any concerns about SEC involvement?

A. Yes.

Q. Why? And that's why with respect to both of those civil suits or SEC involvement.

A. We had been addressing these significant issues relative to the Raptors, both the third quarter earnings issue, the balance sheet issue. There was client – I'm sorry – there was the employee assertion issue.

Q. When you say "the employee assertion issue" what are you referring to?

A. Sherron Watkins' allegations. All of those things were significant events. ENRON was fixing to announce a quarter when it was taking over a billion dollars in losses. That was a significant event. All of those events caused a period of heightened awareness where we had a substantial amount of consultation going on. And, you know, certainly the threat of potential civil litigation or SEC questions about any or all of these issues were on our mind.

Q. Did you, in the beginning of October, know one way or the other whether ENRON would need to restate its earnings?

A. In early October? I'm sorry. What was the time frame?

Q. In the early October?

A. No, I didn't know they would have to restate their [1905] earnings.

Q. Was that a possibility?

A. Well, we had – we were considering the balance sheet error, but we had not concluded that it would cause a restatement.

Q. And how about the Raptor aggregation issue?

A. Same thing: That was an issue that could possibly result in restatement; but we had not concluded that it would cause a restatement yet at that time.

Q. And had you concluded that it wouldn't?

A. We had not concluded that it would not.

Q. Is that the issue that, until October 16th, there was no disclosure on in terms of Arthur Andersen?

A. That's correct.

Q. What was your understanding when there's a restatement about whether lawsuits followed?

A. My understanding would be that that would be an expectation after a restatement.

Q. And how about the SEC looking into the reasons for the restatement?

A. Same expectation.

* * *

[1909]

* * *

Q. In October of 2001, did you understand what the law required?

A. I did not.

Q. Did you think at the time that you were committing a federal crime? In other words, your conduct and your intent made you guilty?

A. I did not. I thought this was all entirely appropriate until when I received a subpoena.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	:	Criminal Action
	:	No. H-02-121
vs.	:	Houston, Texas
	:	
ARTHUR ANDERSEN, LLP,	:	May 15, 2002
Defendant	:	9:10 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MELINDA HARMON
AND A JURY

Volume VIII

* * *

[Testimony of David Duncan]

[2076]

* * *

Q. And so when we talk about what you were thinking in October of 19 – I mean, excuse me, of 2001, would it be a fair statement that your view was it was perfectly appropriate to discard extraneous matters because you had neither been sued nor served with a subpoena?

A. That is correct.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	:	Criminal Action
	:	No. H-02-121
vs.	:	Houston, Texas
	:	
ARTHUR ANDERSEN, LLP,	:	May 16, 2002
Defendant	:	9:10 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MELINDA HARMON
AND A JURY

Volume IX

* * *

[Testimony of David Duncan]

[2480]

BY MR. HARDIN:

Q. When is the first time you remember thinking that the SEC -- the SEC might want some of your documents?

A. I think the first time over this time frame that I remember thinking the SEC might want some of our documents was probably in the late September time frame.

Q. Who did you say that to during that time frame?

A. At that time frame, we had the balance sheet error which was going to be adjusted in connection with the third quarter. And, also, we had been asked by ENRON what -- what our recommendations were with respect to their activity -- their -- their courses of activity with respect to the Raptor entities. And they concluded in late September to buy out of the Raptor entities, which was going to result

in a very significant charge to income.

And during that time, I believe that -- well, I know that I thought there was a possibility that the SEC would look into these issues and perhaps want to look at some of our documentation.

* * *

[2481]

* * *

Q. So you -- your memory is you thought of those terms before October 17th or before you were notified on [2482] October 19th about the SEC having an informal inquiry of ENRON?

A. Of the possibility that the SEC may want to look into these matters and then perhaps look at our documents?

Q. Yes, sir.

A. Yes. I thought of that as a possibility.

Q. Okay. Now, when you thought that was a possibility, were you're thinking it was a possibility during the time that y'all were discovering -- discussing how to document these issues?

A. Yes.

Q. And during the conversations you had about how about how to document them, were you thinking, We need to make sure we have the complete picture here in case the SEC wants to look at this one day?

A. Yes. That was what the large part of the exercise was about, yes.

Q. So when you were thinking about the SEC may want to see these documents one day, is it a fair statement you were thinking in terms of let's make sure we have this fully documented so it is there in case they want to see it?

A. Yes. I believe that the documents would entail the work paper documents which we were working on to make

sure they were complete.

Q. Okay. And so during the period of time, did others [2483] express the concern that they also wanted to make sure that these documents fully revealed what y'all were talking about?

A. Yes.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	:	Criminal Action
	:	No. H-02-121
vs.	:	Houston, Texas
	:	
ARTHUR ANDERSEN, LLP,	:	May 17, 2002
Defendant	:	8:45 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MELINDA HARMON
AND A JURY

Volume X

* * *

[Testimony of David Duncan]

[2712]

* * *

Q. When do you believe -- when do you remember or what is your best memory of when you, yourself, either deleted or discarded any files of your own? Can you walk us through how you went about that?

A. Again, I don't recall a specific date. I know that it was something I had on my mind since I had the meeting, that I should, you know, go through my desk files and also my e-mails, which would have been the two sources of files that I had maintained.

Q. You would have had hard copy and you would have had e-mails; right?

A. From hard copy and some e-mails.

Q. Okay.

A. And, as I recall, there was a time I had a break and did it. And I don't recall exactly what day that was. And I took some time and had Ms. Adlong come in and went through my desk files and gave her some things that I thought were appropriate to discard.

Q. And what did you pick to discard?

A. I don't recall everything that I did, but I went through my files and various memos that were duplicative or old or research materials I thought were no longer relevant. I [2713] recall that there was a number of drafts of old financial statements that I had retained, still had copies of, that I gave her. And possibly some other items. I don't, again, recall everything that I might have given her.

Q. You basically gave her extraneous things to discard, didn't you?

A. I gave her things that I thought were extraneous, yes.

Q. And did you use the same standard as what you deleted from your e-mails?

A. I did go through my e-mails, I don't think at the same time. I think at some other time or maybe multiple times, and again, the same process: deleted things that I thought were no longer useful. I did make an attempt to clean out my e-mails fairly thoroughly when I did go through this process, as I recall.

Q. Had you ever done this before?

A. I had certainly gone through my e-mails and cleaned out my e-mail box before on periodic occasions. I don't recall, other than in the process of moving or some action that required me to clean out my office or just a lack-of-space type of issue, that I ever made a conscientious effort to go, go through my office with the thought of the document retention policy.

Q. And, as a matter of fact, over a period of time, you had accumulated a good matter of material, hadn't you? [2714]

A. That's all relative. Maybe not as much as others might have that I knew, and more than some I knew.

Q. All right. Would you tell the jury, was it about -- just about 20 files that you gave Ms. Adlong? Does that sound about right?

A. I don't know the number. I think I gave her -- you know, best I can recall, a foot or a couple of feet of documents.

Q. Can you just sort of take your hand and use the counter in front of you and sort of demonstrate to the jury about the height of what you gave her?

A. Well, again, a foot to a couple of feet of documents. I would say this (indicating).

Q. Okay. Where did you get those documents?

A. From my office. Desk files in my office.

Q. In various places; right?

A. Yes.

Q. You didn't give her any work files to be destroyed, though, did you?

A. Work papers?

Q. Work papers.

A. No, I did not.

Q. And work papers were not something you were -- that was something you were trying to make sure everybody got complete and full; right? [2715]

A. Yes, I was.

Q. And there was no intent and no action on deleting any work papers or destroying any work papers, was it?

A. Not things that I thought were work papers, no.

Q. In fact, this whole -- when this whole matter became an issue around first week in January or so, whenever,

Mr. Duncan, you became aware of everyone's concern about this, isn't it true to this day you don't know of any work papers that were ever destroyed by people who worked for you at Arthur Andersen?

MR. WEISSMANN: Objection.

THE COURT: Sustained.

BY MR. HARDIN:

Q. Do you know of any work papers that were ever destroyed? I'm asking what you know of. Do you know of any work papers that were destroyed by anybody in this -- getting in compliance with the document retention policy?

A. I do not know of any work papers that were destroyed.

Q. And you never asked anybody to destroy work papers, did you?

A. I never asked anyone to destroy work papers.

Q. In fact, you asked them to make sure they were preserved and complete, didn't you?

A. I worked with people to make sure that the files were complete, yes.

* * *

[2724]

* * *

Q. Okay. Do you remember any of the other things that you reviewed and gave to Ms. Adlong to get rid of or that you deleted from your e-mail?

A. I mentioned some categories earlier when we were talking about hard-copy documents.

Q. What were those categories?

A. Some old financial statement drafts.

Q. All right. What else?

A. Repetitive memos.

Q. Okay.

A. Meeting agendas that --

Q. Media?

A. Meeting agendas.

Q. All right. I'm sorry. What else?

A. I don't recall further.

* * *

[2725]

* * *

Q. Did you discard anything having to do with the Raptor discussions and disagreements between you and PSG?

A. I don't recall.

Q. Did you discard anything having to do with the contra equity?

A. I don't recall.

Q. In fact, you preserved some documents concerning that, didn't you?

A. We certainly were preserving the final memos on that. I don't recall if I deleted any correspondence related to either of those issues.

* * *

[2766]

* * *

BY MR. HARDIN:

Q. Isn't it true that there are no facts or conduct that you intended to keep from the SEC in October and November of 2001?

A. I'm not sure I understand the "facts or conduct." I'm not sure I understand.

Q. Were there any facts or transactions that you, as an accountant, participated in or that you were familiar with on behalf of your company that you were trying to keep from the SEC in October or November of 2001?

A. Again, any facts, I'd have to answer that yes, if you

include "facts" broadly.

Q. What do you mean by it?

A. Well, I know that I destroyed, myself, documents, that would not be available to third parties, including the SEC.

Q. I understand that, sir. And I understand you to be saying documents. But what I'm asking you is: Was there any information that you wanted to keep from the SEC?

A. Any information that I set out to target to keep from the SEC?

Q. Yes, sir.

A. Again, I'd have to say those documents that I destroyed, the information on those, I knew was not going to be [2767] available for the SEC.

Q. Let's take that step-by-step.

That's not quite accurate, is it sir, in this sense -- let me ask you --

MR. WEISSMANN: Objection as to form.

THE COURT: Sustained.

BY MR. HARDIN:

Q. Let's take it step-by-step.

What information in any documents that you destroyed did you have the intent to keep from the SEC?

A. I'm having a hard time with the question in that I don't recall all the information in any of the documents I destroyed. But I'm reluctant to say that no information in the documents I destroyed did I intend to keep away from the SEC, because I knew all of the information in any of the documents I destroyed would not be available for the SEC.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	:	Criminal Action
	:	No. H-02-121
vs.	:	Houston, Texas
	:	
ARTHUR ANDERSEN, LLP,	:	May 22, 2002
Defendant	:	9:06 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MELINDA HARMON
AND A JURY

Volume XIII

* * *

[Testimony of David Stulb]

[3666]

* * *

Q. Now, when we went off on discussing the Vinson & Elkins report, you were telling us about your receipt of it from Mr. Duncan. And I believe was that in his office?

A. It was.

Q. And what else happened in his office besides getting the Vinson & Elkins report? [3667]

A. Having conversations, discussing the VE report, and he also mentions to me -- and I had learned this the day before -- that a partner that was not on the ENRON account, had also received a call from Sherron Watkins that where Ms. Watkins essentially reiterated what she had put in writing to ENRON. He said, "Here's a document, an e-

mail that was forwarded by this fellow." As he pulled it out, he said something to the effect, "Another smoking gun. We don't need this," and that he was going to remove the top page. And I stopped him from doing that.

Q. And when you say he did that, who are you referring to?

A. David Duncan.

Q. And was this on a top piece of paper?

A. It was a – it was an internal Andersen e-mail with an attachment, so this was the cover to the attachments.

Q. And what is it that he you saw him doing?

A. Again, as I indicated, he was reading this and used words "another smoking gun. We don't need this." And it appeared that he was going to be removing the top page from the body of the overall document.

Q. And what did you do when you saw that?

A. I said, "Dave, I'm not sure if you had any discussions, but you really need to keep all of this information because this is – there's a strong likelihood that we'll be subject to litigation and the SEC, Justice Department and other [3668] bodies may be interested in this type of information." And he said, "Fine."

Q. Did you specifically mention the SEC and the Justice Department?

A. I believe I did.

Q. And he said, "Fine"?

A. Yes.

Q. Based on what happened in his office, did you call anyone?

A. I did. As I indicated earlier, I took the copy of the V and E report, Brian Loughman, Brian Seibrey and I read it and got their conclusions and decided that I would call John Geron, who I trusted and knew that this was one of the areas that he would be interested in. I pulled John out of a fairly, what I would call, an urgent meeting he was a little grumpy, and said, "What are you calling for?"

And I said, "John, I don't mean to bother you,

but, quickly, have you read the V and E report?"

And he said, "No."

And I said, "Well, you ought to take 10 minutes. It's a very short report." And I said, "At least in my viewing and those are the guys it's a white-wash.

And he said, "Okay."

I also said also that Dave Duncan needs some guidance on document retention. And he said, Call Nancy [3669] Temple. She has responsibility for that area," and hung up.

Q. Now, you said you pulled him out of an urgent meeting; is that correct?

A. That's what I was told. I tried to reach him, and I told the secretary that I wanted to speak with him. And she had to pull him out of a meeting.

Q. Did you consider it – what you were going to communicate to him important?

A. Yes.

Q. And you communicated to him your views and the views of BIFS with respect to the Vinson & Elkins report?

A. Again, I didn't go into detail. It was probably a 90-second conversation. I just said, you know, again, "Have you read the report? If you haven't, you know, it's well worth your time, because" it's," my words "I think problematical problem for us.

Q. And what did he say about whether he had read it or not?

A. He said that he had not, and he gave me the impression that he would look into it.

Q. And was this the same day that you made this phone call?

A. That was probably 40 minutes after, you know, my meeting with David Duncan.

Q. So that Wednesday, the 31st?

A. Yes.

Q. Now, you said also that you said to him that Mr. Duncan [3670] needs, I think your words were, "guidance";

is that correct?

A. Yes.

Q. And what was the guidance that you said he needed?

A. Guidance in document retention.

Q. Why?

A. Because I was concerned that if he was, you know, going to remove this document, that maybe he had not had any definitive conversations relative to the type of discovery motions that we could potentially be subject to. And I had, I think, probably a five-minute conversation trying to help -- he had the deer-in-the-headlight syndrome. Again, I've been in many situations where I've been asked to go into an environment where somebody that does not have the type of training or has not worked with lawyers on a regular basis they just don't know. And it was my impression at the time that Dave was doing something that he didn't understand the ramifications. And I walked him through what this would be like and suggested that he get some guidance himself from, you know, either Odom or Temple or whomever. And he said, "Fine."

Q. You thought he needed legal advice because he hadn't dealt with this situation?

A. Yes, I did.

MR. HARDIN: Excuse me, Judge. He didn't say that, and that's an awful a lot of leading. He can ask him [3671] what kind of advice he gave. The witness has told him, and I object to leading.

THE COURT: Overruled.

BY MR. WEISSMANN:

Q. You can answer.

A. Can you repeat the question, please?

Q. I believe my question was you thought he needed legal advice?

A. I believe he needed internal legal advice. Yes.

Q. And internal, could that come, that internal advice, from Andersen's internal counsel?

A. That's the norm in my experience at the firm.

Q. Now, you said that you had concerns because of what you thought he was appearing to remove the page that said "smoking gun."

What was your view on whether someone should be getting rid of that kind of document at this time?

A. I obviously stopped him because I was concerned that, you know, that type of documentation be retained. Obviously, it took me a day to get the V and E report. And I subsequently learned that there was only one copy of the report and Dave had it. So I wanted to make sure -- that's why we made three copies, you know, one for each of us; that there was -- this document would be available to the working group. [3672]

Q. And what was your view of whether it would be appropriate at this time, on the 31st of October, to be getting rid of documents relating to ENRON?

A. I think it would be, at least in my experience, inappropriate to be getting rid of documents at that time.

Q. Why would it be inappropriate?

A. Well, I think that clearly there was an informal SEC inquiry. The company had been named in several strike lawsuits by Milberg, Weiss, which is probably the most aggressive strike law firm in the United States. And based on -- if Dave Duncan and others were correct and Chewco was blown, we were probably dealing with illegal acts and, as relayed to me as a firm, have disclosure obligations relative to that. Or the company would have disclosure obligations.

Q. And would there also be accounting issues?

A. Yes.

Q. Now, you mentioned that -- I believe you said Mr. Geron referred you to Ms. Temple; correct?

A. He did.

Q. And did he say why Ms. Temple?

A. He said she was responsible for that area.

Q. And when you say "that area," what are you referring to?

A. I mean, we -- again, my experience with the firm, in most of these situations, there's a lawyer from our legal department that's assigned to a working group like this that [3673] has responsibility and having the privilege for Andersen and also in providing guidance to partners or employees relative to what our obligations are, given whatever the facts are.

Nancy, who I had not worked with before, and again subsequently learned was fairly new to the firm, was that person. So when John indicated, "Call Nancy Temple," it was a very normal comment in that, you know, Nancy will be working with us and can help Dave Duncan deal with this issue.

Q. And the fact that you had seen Ms. Temple the day before at the large meeting that you attended with Mr. Loughman and Mr. Sibrey^ ??

A. I did. It was the first time I had met Nancy.

Q. And that was here in Houston correct?

A. It was.

Q. So she had come from Chicago to Houston?

A. Yes.

Q. Did you follow up as Mr. Geron suggested and call Ms. Temple?

A. I eventually -- I think I left voice mail for her on the internal Octel system. We have an internal Octel system, and, also, we had a contact list of cell phones. And I asked her to give me a call urgently. And I think she reached me, you know, at some point shortly after the Geron call. And we have a conversation that's similar to that that I had with [3674] John Geron.

Q. Tell the jury about it. What did you say to her?

A. I started off saying that "John asked me to give you a call. Had you read -- have you read the V and E report, Nancy?"

And I think she said, No, but she was aware of the conclusions. And I said that "This is going to be a problematical problem. If you haven't read it, you ought to

read it." We talked a little bit about some of the issues relative to Vinson & Elkins' independence and was she aware that Max Hendricks, also a relationship partner, was involved with setting up some of the SPEs from a legal structural perspective?

We talked a little bit about, you know, what role BIFS could do, you know, in assisting the firm to build a fraud argument, i.e., that we were misled. I think I closed out Nancy, "By the way, John asked me to tell you that David Duncan needs some guidance on document retention."

And she said, "Fine. I'll take care of it," and ended the conversation.

Q. And do you know one way or the other whether she took care of it?

A. Do I know now or did I know at the time?

Q. Did you know at the time?

A. I assumed that she was going to follow up. I don't know [3675] whether she called Dave Duncan directly.

Q. And what did you understand -- what did you understand from your conversation you wanted her to do?

MR. HARDIN: What he understood he wanted her to do is irrelevant. The question is what he did.

MR. WEISSMANN: I can rephrase it.

THE COURT: All right.

BY MR. WEISSMANN:

Q. What do you want her to do?

MR. HARDIN: Excuse me. I thought that was what was just sustained.

MR. WEISSMANN: That was rephrased.

THE COURT: No. He rephrased it. What did this witness want Nancy Temple to do?

MR. HARDIN: And my only point, that's irrelevant.

THE COURT: Overruled.

MR. HARDIN: Thank you.

BY MR. WEISSMANN:

Q. You can answer the question.

In your conversation with Ms. Temple, what did you want her to do?

A. Provide guidance in document retention.

Q. And when you say "provide guidance," did you think it was a good time for Mr. Duncan or anyone in Houston to be destroying documents relating to ENRON? **[3676]**

A. No.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	:	Criminal Action
	:	No. H-02-121
vs.	:	Houston, Texas
	:	
ARTHUR ANDERSEN, LLP,	:	May 23, 2002
Defendant	:	8:04 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MELINDA HARMON
AND A JURY

Volume XIV

* * *

[Testimony of David Stulb]

[3817]

* * *

BY MR. HARDIN:

Q. Mr. Stulb, I would like to go back now, if I can, to this conversation on Wednesday morning that you had with Mr. Duncan to see if you can put it into context and what you remember and what you observed at the time, okay?

First, if you would, describe for me in your **[3818]** own words just the sequence of events, how Mr. Duncan acted, how you acted, and what the event was.

A. Dave either finds me or his secretary finds me from a conference that we were sitting in. I asked for the V&E report. We walk over to his office. He walks behind his desk and either pulls this manila folder from either the

credenza from behind his desk or the desk, walks over, opens it up, opens the manila folder up, pulls out the V&E report. On top of the V&E report are some handwritten notes that he removes. I asked him what they are. He said notes from his meeting with Vinson & Elkins and Enron.

Q. Are they -- can you tell me -- let me just stop you there. These handwritten notes, were they on a sticky or were they on a full sheet of paper or what?

A. It was on a white legal piece of paper. It was not a yellow sticky.

Q. He told you they were what?

A. His notes from a meeting he had at Enron with Vinson & Elkins to deal with the Watkins' allegations.

Q. Did you look at those notes at all?

A. Very briefly.

Q. But he showed them to you?

A. He did.

Q. Did you see anything of interest in the notes one way or the other to you? [3819]

A. No.

Q. Then what did he do?

A. He gave me the V&E report. We talk about the V&E report, have a conversation; and we segue into the Hecker memo. He has it in his hand. He's reading it as I'm reading it; and as, I think, we're both reading it, he is looking at the document and in what appears to be reading "Another smoking gun. We don't need this."

Q. And when he --

MR. HARDIN: Let's see, if we can, put the memo back up again.

810, please.

Thank you, sir.

BY MR. HARDIN:

Q. All right. If I can -- if you'll just pretend you're David Duncan and do it the way he did it. Are you looking at this e-mail at the time of the conversation you're talking about?

A. We were both looking at it.

Q. Is he holding it in his hand or do you have it or what?

A. He's holding it in his hand.

Q. Is either one of you reading it out loud, the e-mail?

A. I think he's looking at this, I think, refreshing his memory. He hasn't seen it in a while, and I think he focuses on reading "Another smoking gun" or words to that effect, [3820] Mr. Hardin. I mean, I don't precisely remember, you know, exactly everything that took place; but words to the effect were -- he's reading from the document, "Another smoking gun. We don't need this."

Q. All right. Now, it says, "Here's my draft memo for your review for smoking guns that you can't extinguish."

Do you recall whether he read the second sentence, "I tried to include only the perspectives or so"?

A. The only thing I recall him saying from reading the document were words to the effect "Another smoking gun." You know, "We don't need this."

Q. Now, do you recall saying this in the grand jury: "Dave found the document and he said words to the effect," quote, "'We don't need this,' and the title of the e-mail was 'Another smoking gun,' and he started to remove it, and I stopped him"? Do you recall saying that?

A. I do.

Q. All right, sir. Now, that, of course, doesn't have him saying, "Another smoking gun we don't need." It doesn't put those two phrases together, does it?

MR. WEISSMANN: Objection.

THE COURT: Overruled.

BY MR. HARDIN:

Q. It doesn't put those two phrases together in that version? [3821]

A. It doesn't. If I may clear it up, Mr. Hardin.

Q. I wish you would. Please.

A. I saw this document when I was -- this cover page and this e-mail --

Q. Okay.

A. -- and have not seen the cover page again until yesterday. The documents that were provided to me over the last 60 days only included the body of the Hecker memo, if you will.

Q. Okay.

A. So, yesterday was the first time I saw that phrase since I read it with Mr. Duncan whenever that date was, on the 31st.

Q. All right, sir. Now, did you -- what significance did you attach -- let me ask you this: Did he try to remove this e-mail from the document?

A. It looked like he was trying to pull the cover sheet off, yes, sir.

Q. By the staple or what?

A. It was stapled.

Q. Okay. And what did you say to him?

A. "Dave, you need" --

MR. WEISSMANN: Objection. Asked and answered.

THE COURT: Sustained.

MR. HARDIN: Asked by them. [3822]

MR. WEISSMANN: Objection. Asked and answered.

THE COURT: Sustained.

BY MR. HARDIN:

Q. What did you take him to mean? Did you think he was trying to get rid of something?

A. Yes, sir.

Q. What was your reaction? What did you believe?

MR. WEISSMANN: Objection.

THE COURT: I'm going to ask you to rephrase that.

BY MR. HARDIN:

Q. All right. Do I recall correctly you saying to the jury yesterday that he acted like somebody who didn't think he was doing anything wrong?

A. Yes, sir.

Q. And was that your impression, that he was naive about this?

A. I think he was naive, yes, sir.

Q. Did you think he was naively about to take an e-mail on top of a substantive document and put that e-mail aside or throw it away?

A. Yes, sir.

Q. Did you get the impression that he thought that was okay and there was nothing wrong with it?

A. I'm not sure what the impression was. I was concerned that he was going to do something with the document that [3823] would later put the firm in harm's way, if you will, and I stopped him.

Q. All right. You thought that that was something that you didn't think was a good idea, right?

A. Yes, sir.

Q. And you thought he was about to use bad judgment -- innocent bad judgment, isn't it true, and discard a document that you didn't think should be discarded?

MR. WEISSMANN: Objection.

THE COURT: Sustained.

BY MR. HARDIN:

Q. Did you believe he was using innocent bad judgment?

MR. WEISSMANN: Objection.

THE COURT: Sustained.

MR. HARDIN: What is the objection to that?

THE COURT: Please move on.

MR. HARDIN: I'm sorry, Judge.

THE COURT: If you want to know, come upstairs. Come upstairs? Come up here.

MR. HARDIN: I take it back. I take it back.

Can I, at least, ask counsel for a basis of the objection?

THE COURT: Not now. Please continue.

BY MR. HARDIN:

Q. Now, you told him that potentially there might be [3824] litigation and there might be discovery down the line,

did you not?

A. Yes, sir.

Q. You used the phrase, did you not, that he looked like a deer caught in the headlights?

A. I did.

Q. What did you mean by that?

A. Very often when we have been involved with situations involving similar issues and you conduct, you know, preliminary interviews of audit partners that have not been subject to litigation or not subject to significant scrutiny, you know, often professionals will make bad judgment or innocuous and the role of a risk management group or lawyers or folks like ourself is to give them best practices as to what they can expect.

And you know, Dave's actions were not uncommon, in my experience, when somebody had the pressure that he had. I think it would be fair to say that the firm's leadership was looking at what he was doing and what he had done. He clearly, you know, was under pressure, had tension and all the things that would come with that.

And again, you know, I didn't focus on, you know, his state of mind of what he was doing at that time. I saw him conduct an act that, again, you know, if I was to benchmark it, you know -- that's why I used the phrase deer [3825] in the headlights type of situation.

Q. And what you observed was common with what, did I understand you to just say, other circumstances you had seen similarly where innocuous bad judgment was used?

A. Yes.

MR. WEISSMANN: Objection. Asked and answered.

THE COURT: Sustained.

MR. HARDIN: I'm just making sure that --

BY MR. HARDIN:

Q. And I believe the answer was yes; is that right?

MR. WEISSMANN: Objection.

MR. HARDIN: Thank you.

THE COURT: Sustained.

BY MR. HARDIN:

Q. What was his reaction when you told him that was not a good idea as to what you thought he was about to do?

A. He said, "Fine."

Q. Did he say anything to you at the time about having just seven days before had a meeting with people in which he had asked them to get in compliance with the document retention policy?

A. No, he didn't.

Q. Did he say anything to you in that conversation, "Well, oh, I've asked people to get rid of extraneous material or people are getting" -- not have asked but "People are getting [3826] rid of extraneous material right now all over this engagement team"? Did he say anything to you about that?

A. No, Mr. Hardin. If I understood that he was doing anything like that, I mean, I would have, you know, obviously, had taken a different response.

Q. And said don't do it?

A. Don't do it.

Q. Because people may misunderstand later, right?

A. Clearly, yes.

Q. All right. Now, did you have any indication from any of the other people -- senior people at Arthur Andersen during any of these conversations -- now you're into the 31st, I believe, in Houston -- that they had been made aware that Mr. Duncan had done that?

A. If I understand the question, did anybody else know that Dave Duncan was getting rid of documents pre the 31st?

Q. No, sir. I didn't say that Dave Duncan was getting rid of documents. What I asked was did you have in any of these conversations any indication from any of these other people -- let me back up. You would agree that these conversations about what to do about the Enron matter were being conducted at the highest level of Arthur

Andersen? Would you agree?

A. It was.

Q. And in any of these conversations you had been in with these other people, was there anything ever said that [3827] indicated any of them were aware of a meeting he had had back on the 23rd asking people to get in compliance with the document retention policy?

A. No, sir.

Q. During the entire time you were in Houston before you left around 1:00 on the 31st, did anybody in your presence at the highest level ever, including Nancy Temple, ever say or discuss anything about the document retention policy?

A. There was no discussion on either the calls or during my short visit to Houston about document retention.

Q. All right. And any conversations or talk that indicated any of them were aware of Mr. Duncan's view?

MR. WEISSMANN: Objection. Asked and answered.

THE COURT: Sustained.

BY MR. HARDIN:

Q. Now, when you had this conversation with him about it, tell me best you can remember what you said to him about getting guidance on document retention. What did you say exactly?

A. I simply said that -- words to the effect that "Enron had already been named in an action and that all of this documentation, particularly, in the file would be subject to future discovery and that" -- words to the effect -- "Government organizations would probably be interested in these documents." [3828]

Q. Did you say that? You never said that really, have you, about governmental institutions?

MR. WEISSMANN: Objection.

BY MR. HARDIN:

Q. Can you recall any time you've ever said that?

A. I think I said to him the SEC and potentially the

Justice Department.

Q. Do you recall ever saying it -- did you say that to the grand jury?

A. Mr. Hardin, I don't reflect back as to what I said. I've been interviewed a number of different times.

Q. Yes, sir.

A. And words to the effect were that I told Dave he should keep these documents because they would be subject to discovery, and I think I indicated that the SEC and other government bodies, potentially, the Justice Department may be interested in that.

Q. Can you -- did you tell the Government that during your interviews with them? I'm not suggesting you did. I'm asking if you ever said that before?

A. I think I probably have, sir, yes.

Q. Do you recall talking to them in terms of -- do you recall whenever you've mentioned that before and to whom, about governmental agencies? That's the only thing I'm asking. [3829]

A. I believe I mentioned it at the first interview I had.

Q. So that should be in the February 26th interview?

A. If that's what the date of the 302 is.

Q. Let's assume we can all agree that you were interviewed on the 26th. And haven't you always said before, Mr. Stulb, that you told them that these documents like this would be subject to -- potentially to litigation in the future?

No. I want to apologize to you. I just found it in your grand jury testimony. You're right. See if you remember saying this. "I said, basically, 'Dave, basically, you know, we're going to be subject to discovery, potential litigation, potential government inquiries and you really need to see -- get some guidance on document retention.'" Is that, basically, what you remember saying?

A. That accurately reflects what I said.

Q. What did you mean by "get some instruction on document retention"?

A. Means get direction from our risk management function as to what you should do with all these documents; and in my experience, if you get direction from the risk management function at Andersen, they're going to give you very specific directions as to what you should do.

Q. Okay. Who all did you tell him that he might check with?

A. I think I used the names Geron, Odom, and Temple. [3830]

Q. Okay. Did you make a preference for any one of those?

A. No, I did not.

Q. All right. Did you suggest what he should ask them at all?

A. No, I did not.

Q. All right. And how would you describe his response?

A. He said, "Fine."

Q. Did he appear appreciative?

A. Yes.

Q. Did he appear to resent it?

A. No.

Q. Did he appear concerned about it?

A. No.

Q. Did he ever give you any evidence that day that he thought he had done anything wrong?

A. No, sir.

Q. All right. And did you walk away thinking he was naive?

A. I walked away thinking he was naive, yes.

Q. And one of the things you thought he was naive about, was it not, was after you read the Vinson, Elkins report?

A. I was very concerned -- if you will, I mean, I was more concerned on the V&E report and the position that the firm was in than I was about the action relevant to the smoking gun document, if you will.

Q. The e-mail page -- have you since become aware that

he [3831] not only retained one copy but several copies of that e-mail?

MR. WEISSMANN: Objection.

THE COURT: Sustained.

BY MR. HARDIN:

Q. Would it make you feel better if you know that he took your advice?

MR. WEISSMANN: Objection.

THE COURT: Sustained.

BY MR. HARDIN:

Q. After you left, he could have gotten rid of that e-mail if he had wanted, couldn't he?

A. He could have but it would have been recovered if it was on our system.

* * *

[3834]

* * *

BY MR. HARDIN:

Q. Mr. Stulb, e-mails are kind of like gerbils, aren't they, they just keep going to different, different people [3835] when they're being forwarded?

A. I'm not sure what gerbils do; but if you mean that e-mails can be forwarded on --

Q. I'm not -- go ahead.

A. E-mails can be forwarded on by individuals who receive them, the answer is yes.

Q. You might have an e-mail that ends up going to just about everybody and his brother, right?

A. It's possible.

Q. If you wanted to make sure the information in that e-mail was not available to anyone, you would have to trace each one of those little trails, wouldn't you?

A. Yes, sir.

Q. And in today's modern world, would you agree that it has become impossible to completely eliminate e-mails?

A. I think impossible is probably an overstatement, but it's very difficult.

Q. Have you ever seen it done?

MR. WEISSMANN: Objection.

THE COURT: Sustained.

BY MR. HARDIN:

Q. Now, in this particular case, for instance, on the e-mail, the e-mail would be on -- right there on the e-mail portion. It's kept in two different places on the person's own computer, isn't it? Don't they have a box and --[3836]

MR. WEISSMANN: Objection, Your Honor.

THE COURT: Sustained.

BY MR. HARDIN:

Q. Now, when you read the V&E report, did you -- did you -- I think you told Mr. Weissmann you considered it a white wash; is that right?

A. I did.

Q. And you expressed that opinion very openly to others?

A. I expressed it -- I don't think openly would be accurate. I expressed it to John Geron; at his direction to a lawyer in-house.

Q. Okay. And you believed, did you not, that Mr. Duncan, in your opinion, was naive in connection with this as well as that -- other matters, right?

MR. WEISSMANN: Objection. Asked and answered.

THE COURT: Sustained.

BY MR. HARDIN:

Q. And then after you had read the report, about what time that day -- how long did it take you to read it, by the way?

A. I skimmed it when I'm having this conversation with Dave in, you know, roughly five minutes and then sat down with Brian and Rick, you know, shortly thereafter and

probably took ten to 15 minutes in reading the full report.

Q. Okay. What happened, by the way, with the e-mail and the Hecker memo after you read them? [3837]

A. Dave kept it in the file and what he did with it after that I have no idea.

Q. You gave it back to him?

A. I never took it.

Q. You read it over his shoulder?

A. Yeah.

Q. Or side by side?

A. Yeah.

Q. I got you. And then on the -- when you got through reading the Vinson & Elkins report, did you keep a copy or did you just give it back to him?

A. I took the copy, gave it to Rick, instructed Rick to make three copies, and return the original back to either Dave or Dave's secretary.

Q. All right, sir. Now, about what time that morning did you finish reading it?

A. I don't know. Sometime after 10:00.

Q. Okay. Now, did you do anything else in connection with the case that day before you left on a 1:00 o'clock flight?

A. I had the conversation with John Geron.

Q. Which conversation was that?

A. After reading the report in more detail and asking for Rick and Brian's views as to what they thought about the report, I called John Geron, pulled him out of a meeting. He was short, said "What do you want?" I said, "John, have you [3838] read the V&E report?" He goes, "No." I said, "Well, it's well worth your time. It's a short read and it's very problematical." And I said, "Basically, it's a white wash and it's going to be problematical." And he said, "Fine." I said, "Also, Dave Duncan needs some guidance on document retention." He said, "Call Nancy Temple. Nancy is focusing on this issue or area," if you will.

Q. All right. And so, did you do that?

A. I --

Q. Did you talk to Nancy Temple?

A. I did.

Q. Excuse me. Was she still in Houston at the time you talked to her?

A. I believe she was.

Q. Where were you when you called her?

A. In a small conference room behind Dave Duncan's office.

Q. Did you call her before you left Houston?

A. I did.

Q. Did you consider it a matter of urgency at that time or just something that you thought somebody ought to follow through on?

A. I considered the V&E report a matter of emergency and the document retention as, you know, a follow on to that.

Q. All right. But I'm asking did you consider – him receiving some kind of instruction about document retention, **[3839]** did you consider that an emergency or just something that ought to be followed up on?

A. I considered that something that needed to be followed up on.

Q. All right. And when you called Nancy Temple, what did you say to her and did she tell you where she was when you talked to her?

A. No, she did not tell me where she was.

Q. Okay. What did you say to her?

A. Essentially repeated what I told John Geron, had she read the V&E report. I went into what –

Q. What did she say, had she?

A. I think she was said she was aware of the V&E report and it was unclear to me whether she had actually read it.

Q. Okay.

A. And I simply said – I had more time, if you will. Geron was pressed, wanted to get back into his meeting. Nancy was not pressed, and I think I expressed some of my

concerns why the V&E report was problematical. I think we talked a little bit about, you know, what our potential scope would be.

I said that unless there really was any need for me to hang around – I was unclear whether I was going to be able to meet with Rick Causey. And then we closed off with a meeting – with a call simply saying, "John told me to **[3840]** tell you that Dave Duncan needs some guidance on document retention." And she said, Fine, she would give him a call.

Q. Okay. Now, did you say to her – did you repeat the story that you told the jury about the e-mail incident or did you just tell her in a general sense he needs some guidance on document retention?

A. The smoking gun? I did not repeat that to either John or Nancy.

Q. You didn't tell them what incident had made you think he needed guidance?

A. No, I did not.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Caption Omitted in Printing]

ANDERSEN'S REBUTTAL TO THE GOVERNMENT'S REPLY MEMORANDUM OF LAW REGARDING JURY INSTRUCTIONS

* * *

SEC inquiry, prior to Commission approval, of an audit client's "related party" transactions. For example, in *United States v. Senffer*, 280 F.3d 755, 760 (7th Cir. 2002), the defendant had obstructed an SEC *lawsuit* seeking to freeze the defendant's assets. In *United States v. Browning*, 572 F.2d 720 (10th Cir. 1978), the "District Director of Customs conducted an initial or preliminary evaluation proceeding that was a prelude to a criminal investigation" (*id.* at 723-724) and then, during that investigation, the defendant "counseled, advised and suggested that [a] Belgian corporation ... give misleading, incomplete, and manufactured answers to inquiries of the United States Customs Service" (*id.* at 721). And in *United States v. Leo*, 941 F.2d 181, 199 (3rd Cir. 1991), the Defense Contract Audit Agency was conducting an extensive on-site audit of defendant's cost and pricing data—an activity that, in light of the DCAA's "particular mission," was fairly characterized as a "proceeding." In each instance, therefore, the defendant clearly was aware that the agency had initiated an inquiry into its conduct and took action that directly obstructed such inquiry. The same cannot be said here.

2. Ongoing or scheduled.

The government also asks the Court to reject Andersen's proposed instruction, based on *United States v. Shively*, 927 F.2d 804 (5th Cir. 1991), that the official proceeding must be "ongoing or ... scheduled to be commenced in the future." This argument baldly asks the Court to disregard binding Fifth Circuit authority. It should be rejected.

The government's only argument—the last refuge of the desperate lawyer—is that *Shively* should, for unexplained reasons, be read to establish a rule *only* "for the facts of that case." DOJ Reply Br. 18. But *Shively* did nothing of the kind. The key language of the decision is phrased quite generally, as follows:

> A defendant can act without knowledge of an official proceeding or its federal nature and, as a result, influence the witness's testimony at that proceeding. The coincidence of this act and result will not suffice, however, for criminal liability to attach under this statute. Without at least a circumstantial showing of intent to affect testimony at some particular federal proceeding that is ongoing or is scheduled to commenced in the future, this statute does not proscribe his conduct.

927 F.2d at 812-813. There is no basis for construing this general statement of the law as having application only to the facts of that case. In deed, the Fifth Circuit would no doubt have described the applicable standard far differently had it intended to refute only the specific contention in that case that "efforts to intimidate a witness in a private state court civil suit violated section 1512" when "a federal grand jury proceeding was not commenced until years later." DOJ Reply Br. 8.

In fact, the Fifth Court in *Shively* articulated a perfectly reasonable construction of Section 1512, which this

Court is bound to follow. The court of appeals recognized that some nexus to a particular official proceeding that is either existent or specifically planned is needed to give "adequate notice to potential violators" of what conduct is proscribed. *Reeves*, 752 F.2d at 999. This case, even more than *Shively*, demonstrates the need for a clear and tangible nexus to a particular official proceeding. Without such a well-defined nexus, the line between innocuous file clean-up and criminal obstruction would be hopelessly murky.

D. Collective Knowledge

In addition, the government is plainly wrong in continuing to seek a collective knowledge instruction in this case. At the outset, we note that the government is engaging in wishful thinking—and misleading thinking at that—when it purports to quote our initial brief for the proposition that "Andersen agrees" that a collective knowledge instruction *ever* is appropriate. In fact, the government's quotation omits both the lead-in and the conclusion of our statement: we actually said that, "even if" knowledge ever may be aggregated, it would be inappropriate to do so in the

* * *

DEFENDANT'S REVISED PROPOSED JURY INSTRUCTION NO. 1

Intent to Influence Official Proceedings

An act is done with the intent to impair an object's integrity or availability for use in an official proceeding only if it is carried out with the specific purpose of making that object unavailable for use in a particular official proceeding

[that is ongoing or has been scheduled to commence in the future].[7]

If you find Arthur Andersen persuaded its employees to destroy documents, but that it did so solely for a purpose or purposes other than making those documents unavailable for use in an official proceeding, such as implementing the firm's document retention policy, then you must find Arthur Andersen not guilty. In other words, even if you find that Arthur Andersen persuaded its employees to destroy documents with the knowledge that the documents destroyed would thus become unavailable to an official proceeding, you must find Arthur Andersen not guilty unless you also find beyond a reasonable doubt that Arthur Andersen's specific purpose was to make those documents unavailable for use in a particular official proceeding.

Authority: 18 U.S.C. § 1512(b); *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir. 1991) ("[w]ithout at least a circumstantial showing of intent to affect testimony at some particular federal proceeding that is ongoing or is scheduled to be commenced in the future, this statute does not proscribe [defendant's] conduct"); *United States v. Kellington*, 217 F.3d 1084 1098 (9th Cir. 2000) (Section 1512(b)(2)(B) is "a specific intent crime"); *United States v. Gabriel*, 125 F.2d 89, 105 (2d Cir. 1997) (if the jury had concluded that the defendant's intention was to interfere with a corporate internal investigation, "it would have been

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[7] Andersen contends that the bracketed language is required by *Shively*, *supra*. However, in the event the Court rejects our position that the official proceeding must be ongoing or scheduled, it should still give our intent instruction with the bracketed language omitted.

compelled" to acquit the defendant); *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (construing 18 U.S.C. § 1503) ("If the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.").

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	:	Criminal Action
	:	No. H-02-121
vs.	:	Houston, Texas
	:	
ARTHUR ANDERSEN, LLP,	:	June 3, 2002
Defendant	:	9:12 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MELINDA HARMON
AND A JURY

Volume XXII

* * *

[Testimony of John M. Riley]

[5900]

* * *

Q. At some time during this trip, did you have a conversation with Mr. Duncan about shredding?

A. Yes, I did.

Q. Do you recall when that was?

A. I recall that it was midday on Friday, the 26th. **[5901]**

Q. And how did that conversation come up?

A. The conversation came up because I – on Thursday, the 25th, I had been using a partner's office that in the suite of offices there. But that office was not available on Friday, the 26th, so I was put into a conference room across the hall from Mr. Duncan's office.

During the day, I kept hearing a high-pitched noise coming from -- through the wall in the back of the conference room that I was in. So I walked out of the office at one point in time. Mr. Duncan was walking out of his office, and I just remarked to Mr. Duncan, you know, "What's that noise? Do you guys have a shredder up here?"

Mr. Duncan confirmed that, yes, they did have a shredder on the floor.

Q. As best you can recall, what did he say?

A. He -- best I can recall, he says, "Yeah, we do. We have -- we use it for, you know, client confidential information routine basis."

My response to him was, "Well, this wouldn't be the best time in the world for you guys to be shredding a bunch of stuff."

And Mr. Duncan's response was, "Sure. I can understand that, in your position, you know, worst-case scenario is that when you go into a situation like this and people are destroying a lot of documents." [5902]

Q. Okay. Did he explain to you or communicate to you what kind of documents they were shredding?

A. Well, again, he said client confidential information, routine.

* * *

[5978]

* * *

Q. Well, actually, why don't I just use a specific example.

On November 5th, you told the jury that at that point you knew that there would be restatement that was required and that there needs to be restatement. And [5979] everyone knew on November 5th at Arthur Andersen on the core group and at ENRON, and the

management said that there was going to be restatement; right?

A. That's correct.

Q. That issue was discussed before the 5th, wasn't it?

A. Yes, it was.

Q. It's not like everyone just showed up on the 5th and said, Hey, I've got a new issue. Let's discuss the possible restatement, and everyone decided at that very day; right?

A. No. That did not occur.

Q. And the reason is because people like you are called in early to see what the problems are and to discuss whether that's going to be -- need to have happened; correct?

A. I'm not sure I follow. I mean, it's certainly because what had occurred on the 5th was the culmination of work that we had been doing while we were down there.

Q. Okay. In terms of your own mind -- we'll then talk about what anyone else said -- did you come to any sort of view before the 5th whether you thought a restatement would be necessary?

Let's take necessary first.

A. On the one issue regarding the reclassification of the $1 billion in the first or second quarter of 2001, I believe that that was necessary and appropriate.

With respect to the other issues that affected [5980] the income statement, I had not reached a conclusion until the 5th of November.

Q. Okay. Let's break it down.

On the reclassification, when did you come to your own conclusion?

A. It was -- it was pretty early once I understood the -- you know the nature of the item. So --

Q. Can you give us a date?

A. I'm sorry. I can't.

Q. Can you give us a ballpark?

A. Ballpark, I would say, you know, we had all the facts on that one on probably the 29th or the 30th of October, and had reached -- I had reached, at least, my conclusion by that

point in time.

Q. So by the 29th, 30th or so, thereabouts, John Riley had in his head that, on that issue, a restatement would be necessary?

A. That's correct.

Q. Now, with respect to the other issues, I believe you said that you didn't decide until later that it would be necessary. But my question to you is not when you decided it would be necessary, but -- well, I think that is what I initially asked you.

Did you come to any sort of view about whether it would be likely or not before the 5th? [5981]

A. Not really, because I didn't have information regarding the -- you know, the size of the transactions that we were talking about. And that's what you need to have available to you so that you can make a materiality assessment.

Q. Now, did you get all of that information on the 5th?

A. Substantially, I believe.

Q. So you -- no one made that available to you before that?

A. I just don't recall. We were getting pieces of information throughout that weekend; but I think, you know, everything came together on the 5th, and we communicated it to the audit committee.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	:	Criminal Action
	:	No. H-02-121
vs.	:	Houston, Texas
	:	
ARTHUR ANDERSEN, LLP,	:	June 4, 2002
Defendant	:	9:02 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MELINDA HARMON
AND A JURY

Volume XXIII

* * *

[Testimony of John M. Riley]

[6111]

* * *

BY MR. WEISSMANN:

Q. Mr. Riley, is this a deposition that you gave to the SEC in the Sunbeam matter?

A. Yes, it is.

MR. WEISSMANN: Your Honor, we offer Page 399, lines 11 through 25.

THE COURT: Let's come up to the bench, please.

(At side bar.)

* * *

[6119]

* * *

(Side bar concluded.)

BY MR. WEISSMANN:

Q. Mr. Riley, I'm going to take you back to line 11, and I think we may have this on the screen.

MR. WEISSMANN: But don't put it up yet.

The Government renews its offer of lines 11 through 25 on Page 399.

THE COURT: It's admitted.

MR. WEISSMANN: Okay. Now -- sorry, Agent Patkus. If you have it, if you can put that up.

BY MR. WEISSMANN:

Q. And I think we were asking -- when we broke, the question was -- and I'll do the questions -- "Did anybody ever, and I'm not asking you for conversations with counsel, did anybody ever suggest to you that, or have a conversation with you where a suggestion was made that Arthur Andersen might have a problem with the SEC?"

And did you say, "With respect to this particular engagement?"

A. Probably, yes. [6120]

Q. You're not disputing that you said it, are you?

A. No.

Q. And the question then, which was not exactly in the form of a question, was "Yes."

And then did you give an answer?

A. Yes, I did.

Q. Can you read exactly what you said.

A. The transcript reflects: "I think that you know from the very beginning of a situation like this that you got a potential problem with the SEC because when you have got an article in a major business publication questioning your client's accounting, you can reasonably expect that the SEC isn't going to throw it in the trash can. So, I think we knew

that the investigation was going to take place from the date that we saw the article and so, yes, there is a potential for a problem," period.

* * *

[6196]

* * *

Q. And this particular -- if they had been restated, have you had experience before with companies restating their balance sheet as opposed to restating their income?

A. Yes, I have.

Q. And what have -- how often have you seen that?

A. I've seen it on numerous cases while I was with the SEC.

Q. How is it that the company might have a misstatement on the balance sheet that may have to be corrected?

A. Well, this particular issue is the source of comments by the Division of Corporation Finance fairly frequently. It's an inadvertent error that, you know, companies unfortunately make from time to time, and it does occur. I can't tell you're how many times per year, but it happens.

Q. And what is your experience as to how the SEC handles these errors or inadvertent errors on balance sheets periodically when they surface, like this one did?

A. My experience with this particular issue is that the SEC typically tells the company to restate their financial statements to reflect the change in the balance sheet and it's handled within the Division of Corporation Finance.

Q. Meaning what as to terms of whether there's an actual investigation launched and subpoenaing of documents? [6197]

A. Typically, that an investigation would not follow an error of that sort.

Q. Based on your experience, what was your state of mind and expectation as to the impact this restatement of the balance sheet would have on the SEC in terms of whether it would open an investigation and request Arthur Andersen documents?

A. I did not believe that an investigation would result from the correction of that particular error.

Q. Okay. So though you had concluded a balance sheet restatement would need to be made, did that have any effect on you believing that Arthur Andersen would be either the subject of a subpoena for its documents or any investigation?

A. No, sir, it did not.

Q. When you tell Mr. Weissmann, then, in the middle of October you still were not thinking of the SEC asking for Arthur Andersen's documents, is that a true or untrue statement?

A. Toward the -- well, towards the end of October, when I got involved, I really did not have in my mind any request by the SEC for our documents. That's not my consideration when I get into a situation like this.

Q. Can you recall a time that the SEC ever asked a company or expected a company to restate their balance sheet error that they did request documents and launch an investigation? **[6198]** Just from your own personal knowledge. That's all I'm asking you.

A. I'm not aware of one.

Q. All right. And was that knowledge all part of your mindset back in October of 2001?

A. Again, to the extent that I considered the -- when I thought about that particular balance sheet error, I didn't think that this was the type of thing that the SEC would launch an investigation for.

Q. Now, on the other hand, if a company announces a restatement of earnings of income, what would you expect from the SEC when that happens?

A. Again, depending on the magnitude of the

adjustment, the availability of the company and number of factors that the SEC uses in determining whether or not they're going to investigate particular things, certainly an investigation of that type of restatement could ensue.

* * *

[6202]

* * *

Q. What -- would you tell us what was going through your mind as to what would have been permissible and what would have been impermissible as far as you were concerned when you had the conversation with Mr. Duncan on the 26th about shredding documents? Mr. Weissmann just asked you about it and you partly addressed it.

As far as you were concerned -- let me do it **[6203]** this way: As of the 26th of October, would it have been permissible as far as you were concerned for the engagement team to be shredding of documents?

MR. WEISSMANN: Objection to permissible.

BY MR. HARDIN:

Q. Well, would you think it would have been proper or improper for any documents to be shredded as of the 26th of October by the engagement team?

MR. WEISSMANN: Your Honor, I have no objection. If it's under the firm's document policy would, it be permissible. If it's a question of what does the law require, then I do object.

MR. HARDIN: I'm not asking about the law.

MR. WEISSMANN: That's something the Court will decide.

MR. HARDIN: Could you -- I agree with that last statement. Could you write that down, Judge? It's 2:25 and we agree.

THE COURT: It's the second time today.

MR. HARDIN: We're on a roll. This is dangerous.

BY MR. HARDIN:

Q. But I'm not asking you the law. He's right. I agree with him. What I'm asking you is what was in your mind.

I believe you testified to Mr. Weissmann about a conversation. You said, "This would not be a good time to [6204] be shredding documents" or something?

A. Right.

Q. And I'm asking you: What did you mean by that? What was in your mind, first of all, as to whether it would be permissible to shred some or a lot or not any or what?

A. Okay. I've got a couple of questions there. Let me try.

In my view, it would have been -- it would have been appropriate for the company -- for our engagement team to continue to discard, destroy, shred, whatever, confidential client information that was unrelated to the issues that were at hand. So, for example, when I communicated to Mr. Duncan, my concern about, you know, shredding a bunch of stuff, you know, it certainly in my view would not have been appropriate for the engagement team to have been destroying documents related to the related-party transactions and the special purpose entities that we were going to be looking into.

On the other hand, since the engagement team was in the middle of their completing their review of the third quarter financial statements, to the extent that they were getting documentation in connection with that review unrelated to the SPEs, unrelated to Mr. Fastow's entities, I didn't see any problem with that continued -- continuing to be discarded in the normal course. [6205]

Q. Well, what about drafts? Are you speaking of final documents or drafts and so? For instance, what was your view at that time as to whether drafts would be discarded?

A. I would not have objected to that. I believe that would have continued to be appropriate.

Q. All right. As a matter -- so if they were discarding

drafts of documents that -- where there's a succeeding or superseding file memo, as far as you were concerned, when you talked to him on that 26th, would that have been okay?

A. Yes, sir.

Q. All right. If they were retaining the final memos of the Raptor memos at that time and, therefore, in compliance with the policy as far as drafts and other extraneous matters, in your opinion, would it have been okay for them to be shredding at that time?

I'm not talking about the law. I'm talking about your view.

A. In my personal view, that would have been acceptable.

Q. In fact, at that time, were you drafting any documents or were you doing any kind of disposing of drafts when you had done other documents at that time concerning your investigation?

A. Yes, sir, I was.

Q. Tell us what that was. What did you do?

A. Well, as we were preparing draft agenda for these [6206] various meetings that we were having and with the client personnel as we were sort of drafting scripts for what people, you know, Mr. Duncan and Mr, Goddard and myself were going to say at these meetings, we were disposing of superseded drafts and retaining final copies.

Q. That was being done by all of you?

A. Yes, sir.

Q. So if Mr. Duncan was --

BY MR. HARDIN: May I have just a moment, Your Honor?

THE COURT: You may.

Thank you, Judge.

BY MR. HARDIN:

Q. I'll come back to that subject in a moment.

But did you -- let me ask you this: Why did you wait until January to even mention this conversation with Mr. Duncan?

A. I really was satisfied with the discussion. I really thought in my own mind that, you know, his -- Mr. Duncan's reference to routine client confidential information was a reference to information that was pertinent to the third quarter review; and, you know, I really just thought that that was -- that was okay, and it was, you know, more or less an innocuous conversation.

Q. And did you discard it until later when you heard about [6207] this whole issue? Is that correct?

A. Yes, sir, that's correct.

MR. WEISSMANN: I missed it. I just didn't hear the question.

MR. HARDIN: "Discard," which really was not a good way to put it.

BY MR. HARDIN:

Q. Let me put it -- did you put it on the back burner in your own mind?

A. I didn't have a second thought about it until January sometime.

Q. All right. Now, if, in fact, they had been -- if what was being discarded at the time you heard this fax going and everything were agendas and earlier drafts of documents and things like that, would you have any -- would you have said, "David, don't do it"?

A. No, I wouldn't.

MR. WEISSMANN: Objection.

MR. HARDIN: Okay.

MR. WEISSMANN: I do have an objection to that hypothetical.

THE COURT: All right. I will sustain the objection, but we've already got an answer. So...

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	:	Criminal Action
	:	No. H-02-121
vs.	:	Houston, Texas
	:	
ARTHUR ANDERSEN, LLP,	:	June 5, 2002
Defendant	:	9:19 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MELINDA HARMON
AND A JURY

Volume XXIV

* * *

[6340]

* * *

THE COURT: * * *

Specific instructions. The indictment charges in relevant part, quote, on or about and between October 10, 2001, and November 9, 2001, within the Southern District of Texas and elsewhere, including Chicago; Illinois; Portland, [6341] Oregon; and London, England, Andersen, through its partners and others, did knowingly, intentionally, and corruptly persuade and attempt to persuade other persons, to wit, Andersen employees with intent to cause and induce such persons to, A, withhold records, documents, and other objects from official proceedings; namely, regulatory and criminal proceedings and investigations and, B, alter, destroy, mutilate, and conceal objects with intent to impair the object's integrity and availability for use in such official

proceedings.

Title 18, United States Code, Sections 1512(b)(2) and 3551 and following. Title 18, United States Code, Section 1512(b) provides that—I'm sorry. I should have said close quote.

Now, starting again, Title 18, United States Code, Section 1512(b) provides that, quote, whoever knowingly and corruptly persuades another person, or attempts to do so, with intent to cause or induce any person to withhold a record, document, or other object from an official proceeding or alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding shall be guilty of a crime, close quote.

In order to prove Andersen's guilt—I'm sorry. In order to prove Andersen guilty of violating this [6342] provision, the Government must prove each of the following two elements beyond a reasonable doubt:

First, that on or about the dates charged, the Andersen firm through its agents corruptly persuaded or attempted to corruptly persuade another person or persons; and second, that Andersen through its agents acted knowingly or with intent to cause or induce another person or persons to, A, withhold a record or document from an official proceeding or, B, alter, destroy, mutilate, or conceal an object with intent to impair the object's availability for use in an official proceeding.

A, quote, official proceeding, close quote, is a proceeding before a federal court, judge, or agency. In this regard, you are instructed that the Securities and Exchange Commission, otherwise known as the SEC, is a federal agency, and that a, quote, official proceeding for this case is a proceeding before a federal agency such as the SEC.

A proceeding before a federal agency includes all of the steps and stages in the agency's performance of its governmental functions and it extends to administrative as well as investigative functions, both formal and informal. For purposes of this case, a civil lawsuit brought by private

litigants is not an official proceeding.

For the first element, to determine whether Andersen corruptly persuaded, quote, another person, close [6343] quote, an employee or partner of Andersen is considered, quote, another person, close quote. To, quote, persuade, close quote, is to engage in any non-coercive attempt to induce another person to engage in certain conduct.

The word, quote, corruptly, close quote, means having an improper purpose. An improper purpose for this case is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding.

In order to establish this corrupt persuasion element, the Government must prove that the agent of Andersen who engaged in the persuasion, not the other person persuaded, possessed the improper purpose. The improper purpose need not be the sole motivation for the Defendant's conduct so long as the Defendant acted, at least in part, with that improper purpose.

Thus, if you find beyond a reasonable doubt that an agent, such as a partner, of Andersen acting within the scope of his or her employment induced or attempted to induce another employee or partner of the firm or some other person to withhold, alter, destroy, mutilate, or conceal an object and that the agent did so with the intent, at least in part, to subvert, undermine, or impede the fact-finding ability of an official proceeding, then you may find that Andersen committed the first element of the charged offense.

The second element of the charged offense—[6344] obstruction offense is that Andersen, through its agents, acted knowingly and with the intent to cause or induce another person to withhold a record or a document from an official proceeding or to alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding.

An act is done with the intent to impair the integrity or availability of a document or object only if it is undertaken

with the specific purpose of making the document or object unavailable for use in an official proceeding.

However, the Government is not required to prove that Andersen's sole or even primary intent was to cause another person to make a document or object unavailable for use in an official proceeding. You may find that this intent element has been established if you conclude that Andersen acted, at least in part, with the intent to cause another person to make a document or object unavailable for use in an official proceeding.

In order to establish that Andersen committed the charged offense, it is not necessary for the Government to prove that an official proceeding was pending or even about to be initiated at the time the obstructive conduct occurred. Nor is it necessary for the Government to prove that a subpoena had been served on Andersen or any other **[6345]** party at the time of the offense.

The Government need only prove that Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, that is, a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served.

Furthermore, it is not necessary for the Government to prove that Andersen knew that its conduct violated the criminal law. Thus, even if Andersen honestly and sincerely believed that its conduct was lawful, you may find Andersen guilty if you conclude that Andersen acted corruptly and with the intent to make documents unavailable for an official proceeding.

Moreover, the Government is not required to prove that Andersen was successful or likely to succeed in subverting, undermining, or impeding the fact-finding ability of an official proceeding. Nor is the Government required to prove that Andersen was successful or likely to succeed in making documents unavailable for that proceeding. It is Andersen's purpose and intent, not the success of its effort

that the Government must prove as elements of the charged offense.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Caption Omitted in Printing]

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO ANDERSEN'S MOTION FOR A JUDGMENT OF ACQUITTAL OR A NEW TRIAL

* * *

B. The Hearsay Information Proffered by ANDERSEN Supports ANDERSEN's Guilt

In spite of the overwhelming evidence of its guilt, ANDERSEN argues that the hearsay information from jurors after the verdict demonstrates that ANDERSEN was not properly convicted of a crime. It is wrong.

Even assuming that the jury based its verdict solely on the instructions by Temple reflected in GX 1018B, and even assuming that such evidence was competent to be considered, ANDERSEN has still properly been adjudged to be guilty as charged. Temple advocated the creation of a deliberately misleading document to supersede a more damaging and accurate draft version which would be destroyed. Temple sanitized the record in order to protect ANDERSEN from outside prying eyes i.e., the SEC, which she fully expected at the time to be conducting an investigation of ANDERSEN. In sum, Temple was not giving legal advice; she was giving illegal advice.

In contrast to ANDERSEN'S new contention in its brief, the testimony about the circumstances surrounding GX 1018B figured prominently in the trial and in the government's jury addresses. The context in which Temple gave the instructions reflected in GX 1018B were thoroughly developed at trial through several witnesses,

most notably David Duncan, Benjamin Neuhausen, John Stewart and two SEC representatives. During the summations of the government, Temple's creation of the misleading memorandum was explicitly and repeatedly addressed and argued, among other proof of ANDERSEN's guilt. Indeed, after being directly invited by the prosecution to examine GX 1018B during its deliberations, the jury did just that. The jury asked and received all testimony from Duncan regarding the third-quarter Enron press release. See jury note 11; trial transcript ("TR") at 6648, 6835, 6888-89.[6]

We briefly summarize that evidence herein to refute the claim now advanced by ANDERSEN that in reaching its verdict the jury cobbled together tenuous and tangential evidence that was never elicited or argued by the government.

Duncan testified that he considered the draft of Enron's third-quarter press release to be misleading because it characterized significant losses as "non-recurring," although they were in core Enron businesses. He brought the draft Enron press release language to the attention of others within ANDERSEN, including Temple. TR at 1797-98. A large conference call was held shortly before the issuance of the press release by Enron on October 16, 2001, at which various ANDERSEN partners, including Temple, discussed Enron's proposed use of the term "non-recurring" to characterize losses of hundreds of thousands of dollars. TR at 961, 5590. Neuhausen and Stewart testified that everyone agreed that the proposed press release was "misleading." TR at 967-68, 5591-92. Neuhausen testified that he too believed that the proposed language was

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[6] In rebuttal summation, the jury was explicitly asked to pay particular attention to GX 1018B as "devastating proof," as it was a perfect example of how a draft document was important to a government investigation, since it revealed the truth far better than a sanitized final version. TR at 6646-48; see also TR at 6609-11 (main summation, addressing importance of GX 1018B as evidence of Temple's sanitizing the record in anticipation of litigation).

misleading, both because it reflected losses in core businesses and because gains in the same areas had not been characterized by Enron as non-recurring. Neuhausen believed it to be misleading for Enron to characterize bad news as one-time events but good news in the same business area as not non-recurring. TR at 967-69.

Indeed, Neuhausen explicitly testified that it would not be accurate for a memorandum reflecting ANDERSEN's position to state that the firm had not concluded that the draft press release was misleading. An accurate memorandum would state that the firm had concluded that it was misleading. TR at 969.

As a result of this consensus, Duncan was tasked by the group on the conference call with being its emissary to Enron to apprize it of ANDERSEN's position. TR at 1798, 5593. Duncan did so, and conveyed to Rick Causey, Enron's Chief Accounting Officer, that ANDERSEN considered the use of the term non-recurring to be misleading and that companies had been scrutinized by the SEC for such conduct. Duncan testified that Temple had conveyed that information to him, since Duncan himself did not know that information. Enron declined to change the release. TR at 1799-1800, 1805-06.

Two SEC witnesses testified to the reason ANDERSEN's determination as to whether the release was misleading was important. Under the securities laws, if ANDERSEN determined that Enron was going to commit a materially misleading act, ANDERSEN could face liability if it failed to take adequate steps to have Enron change its course of conduct. Although ANDERSEN voiced its concerns to one Enron official, it did not take the necessary follow-up action, such as going to Enron's Audit Committee, Board of Directors, or reporting Enron to the SEC. TR at 416-18, 793-94. Although ANDERSEN voiced its concerns to an Enron official, it did not take the additional steps of either going to Enron's Board of Directors or reporting Enron to the SEC. As such, ANDERSEN's conduct was

consistent with overwhelming trial evidence that it had abdicated its role as watch dog in favor of that of a lap dog to Enron, its second largest client worldwide.

With that backdrop, Duncan was told to memorialize what had transpired regarding the Enron third-quarter press release. His draft memorandum, one of the documents comprising GX 1018B, was received by Temple. She responded in an E-mail, which attached a revised version of the Duncan draft memorandum, all of which were included in GX 1018B. In the most critical portion of the E-mail, Temple advised Duncan, "I suggested deleting some language that might suggest we have concluded the release is misleading." And the attached memorandum from Temple deleted, among other things, references to the term misleading.[7] TR at 1800-07; GX 1018B.

But, contrary to Temple's E-mail, in fact ANDERSEN had concluded that the term "non-recurring" was misleading

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[7] Temple also made other deletions to the draft memorandum. She deleted references to herself and to consultation with the legal group. As to the former, Temple explained that such a reference would increase the likelihood of her being a witness. As to the latter, Temple explained that it was arguably a waiver of attorney-client privileged advice.

Temple's first concern evidenced her awareness that litigation was on the horizon, particularly when considered in light of her many other instructions during this period to delete the names of lawyers and non-lawyers from memoranda, so as not to be, in her words, in the "testifying limelight." See GX 1025E (10/25/01 E-mail from Temple explaining her deletion of the names of ANDERSEN non-legal personnel: "I understand that it would be helpful to send a message that the highest levels are addressing this, but I think we should keep them out of the testifying limelight if we can.")

As to Temple's second concern, her reasoning even if credited is seriously flawed. Temple deleted from the draft memorandum the reference to consultation with the legal group. A reader of the final memorandum would thus not know from the face of the memorandum that the legal group was consulted. The "waiver" Temple professed to be concerned about had either occurred already (by Duncan's discussion with Enron) or it had not; the internal documentation could not waive the privilege. It could, however, serve to reveal what truly had occurred.

and Temple knew it. The revised Temple document demonstrated in concrete terms how a final version of a document was less accurate than a draft. It was a dramatic demonstration of how a draft that accurately reflected the facts could be sanitized to paint a rosier picture to the outside world.

ANDERSEN argues that the revised false documentation by Temple cannot constitute obstruction of justice. It is wrong. The statute charged in this case is title 18, United States Code, sections 1512(b) (2) (A) and 1512(b)(2)(B). Those sections make it a crime to, among other things, corruptly persuade a person to "withhold a record, document or other object from an official proceeding," or "alter, destroy, mutilate or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding."

Temple's actions clearly were an attempt to withhold an object (the draft memorandum) and to alter, destroy, and conceal that object. ANDERSEN's argument that Temple's edits did not "alter" the Duncan draft memorandum tortures the English language and the clear meaning of the statute. In this case, Temple altered the draft version of a document so that the final version of that document—which would serve as the internal ANDERSEN memorandum documenting its position regarding the Enron third-quarter press release—would present a more favorable view of what had transpired and hide the fact that ANDERSEN had concluded that Enron's press release was misleading. She thus clearly altered and attempted to alter the draft documentation. Contrary to ANDERSEN's view, Congress certainly did not mean Section 1512's prohibition on "alter[ing]" a document to apply only to those few companies that may still use whiteout to make changes to typewritten drafts of documents. ANDERSEN cites no court that has adopted such an absurd interpretation of the alteration prong of Section 1512(b)(2)(B). The statute applies equally well to attempted obstructive changes and

alterations made to an object that resides in electronic form in a computer.

In any event, even if (contrary to fact and law) Temple did not "alter" the draft document, she clearly attempted to "withhold," "destroy," and "conceal" that draft document, since the jury could readily infer that she intended her final version to supersede the draft memorandum, which would be discarded. See, e.g., GX 1018B (A-004625) (Temple wants her name deleted from the draft memorandum so she will not be a witness, a position that would be meaningless if the draft memorandum were intended by her to be retained); DX 476 (Temple E-mail to Stewart, dated 10/14/01, regarding deletion of draft documents by implementation of document policy); GX NT1009 (10/9/01 Temple notes reflecting view that an SEC investigation was "highly probable.").[8]

* * *

[8] ANDERSEN's hypothetical scenarios regarding actions Temple could have taken with respect to the draft memorandum, set forth in footnote 2 of its brief, are unenlightening and inapposite. If Temple instructed Duncan before or during the creation of the draft memorandum to change it so it was deliberately factually inaccurate she would still be guilty of obstruction of justice. There is no meaningful difference between (a) ANDERSEN's hypothetical scenarios, (b) coaching a witness to lie, and (c) the actions that Temple in fact took and which were proven beyond a reasonable doubt at trial. All are prohibited by the obstruction statutes. 18 U.S.C. §§ 1512(b)(1), 1512(b)(2)(A), 1512(b)(2)(B) and 1503.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted in Printing]

BRIEF OF APPELLANT ARTHUR ANDERSEN, LLP

* * *

1. The district court erroneously refused to instruct the jury that Andersen could be convicted only if the obstruction was directed to a particular official proceeding

The district court charged the jury that an "official proceeding" "includes all of the steps and stages in the [federal] agency's performance of its governmental functions, and it extends to administrative as well as investigative functions, both formal and informal." R. 1254-1255.[24] With that as background, the court proceeded to

[24] This aspect of the instruction itself was wrong: an informal SEC inquiry, which is not initiated by a vote of the Commission and which does not have subpoena power, is not an "official proceeding" within the meaning of section 1512(b)(2). As defined by Congress, an "official proceeding" includes "a proceeding *before* a Federal Government agency which is authorized by law." 18 U.S.C. § 1515(a)(1)(C) (emphasis added). A description speaking of proceedings "before" an agency cannot sensibly be read to reach simple investigations like preliminary SEC inquiries. *See United States v. Kelly*, 36 F.3d 1118, 1127 (D.C. Cir. 1994) ("mere police investigation" is not a "proceeding") (construing 18 U.S.C. § 1505) (internal quotation marks omitted). Thus, the leading case on what constitutes an SEC proceeding for purposes of the obstruction statutes, *United States v. Batten*, 226 F. Supp. 492 (D.D.C. 1964), held that the term "proceeding" in 18 U.S.C. § 1505 included "any investigation *directed by a formal order of the Commission*, at which a designated officer takes testimony under oath." *Id.* at 494 (emphasis added). By this measure, preliminary inquiries by SEC staff are *not* official proceedings. The agency's regulations define a "proceeding" as "any agency process initiated by an order instituting proceedings." 17 C.F.R. § 201.101(a)(9) (2003). An "order instituting proceedings," in turn, "means an order issued by the Commission commencing a proceeding or an order issued by the Commission to hold a hearing." *Id.* at § 201.101(a)(7). It is "[t]he issuance of an order authorizing a formal investigation [that] gives the SEC staff subpoena power." Thomas Lee Hazen, LAW OF SECURITIES REGULATION § 16.27[7](4th ed. 2002) (citing 15 U.S.C. § 787(b)).

instruct the jury, over Andersen's objections, as follows:

> In order to establish that Andersen committed the charged offense, it is not necessary for the government to prove that an official proceeding was pending, or even about to be initiated, at the time the obstructive conduct occurred. Nor is it necessary for the government to prove that a subpoena had served on Andersen or any other party at the time of the offense. The government need only prove that Andersen acted corruptly and *with the intent to withhold an*

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Caption Omitted in Printing]

BRIEF FOR THE UNITED STATES

* * *

law to which "ignorance ... is no defense." Cheek, 498 U.S. at 199.[33]

B. The District Court Correctly Instructed The Jury On The "Official Proceeding" Requirement.

In relevant part, Section 1512(b)(2) requires proof that the defendant acted with an intent to impair the object's integrity or availability for use in an "official proceeding." 18 U.S.C. § 1512(b)(2).[34] Although

[33] Andersen cites (Br. 67-68) United States v. Frankhauser, 80 F.3d 641 (1st Cir. 1996), but that case does not hold that persuasion is only corrupt if the actor knows that the conduct is unlawful. Indeed, in Frankhauser, the First Circuit expressly stated that it had yet "to decide what state of mind a defendant must have with respect to an official proceeding in order to violate section 152 ...." Id. at 652. Ultimately, Frankhauser did not adopt a general rule going to this question, and instead cautioned that "[e]ach case must be evaluated on its own facts." Id. Thus, as the district court noted, R. 912, in upholding the defendant's conviction under Section 1512 in Frankhauser, the First Circuit merely concluded that the defendant "had the requisite mens rea, whatever it is. In other words, the Court did not hold that knowledge is a necessary condition, only that it is sufficient.

Andersen also cites (Br. 68) Reeves, 752 F.2d at 999, but that case is clearly inapposite as it does not address the knowledge requirement under Section 1512.

[34] The statutory term "official proceeding' includes "a proceeding before a Federal Government agency which is authorized by law." 18

the district court instructed the jury about

* * *

U.S.C. 1515(a)(1)(C). In a footnote, Andersen contends that a preliminary SEC investigation is not an "official proceeding." Andersen Br. 70 n.24. This Court should decline to consider this claim. See United States v. Restrepo, 986 F.2d 1462, 1463 (2d Cir. 1993) ("We do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review."). In any event, a preliminary investigation by the SEC fits comfortably within the statutory definition of an "official proceeding." R. 822-828, R. 910-911; see United States v. Senffner, 280 F.3d 755, 761 (7th Cir. 2002); United States v. Leo, 941 F.2d 181, 199 (3d Cir. 1991); United States v. Mitchell, 877 F.2d 294, 301 (4th Cir. 1989); United States v. Browning, Inc., 572 F.2d 720, 724 (10th Cir. 1978); Rice v. United States, 356 F.2d 709, 712-13 (8th Cir. 1966).

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Caption Omitted in Printing]

REPLY BRIEF OF APPELLANT ARTHUR ANDERSEN, LLP

* * *

B. The Jury Instructions Improperly Diluted The Required Nexus to An "Official Proceeding"

1. *"Official Proceeding"*

The indictment in this case did not allege that Andersen's conduct was intended to interfere with any "official proceeding" that was pending at the time of the allegedly corrupts acts. R. 1-8. The government nevertheless suggests that the court's instructions defining "official proceeding[s]" properly encompassed the SEC's informal inquiry to Enron on October 17, 2001. DOJ Br. 92-93 n.34. But the government does not even attempt to explain how this informal inquiry—which does not satisfy the agency's own regulatory definition of a "proceeding" (Andersen Br. 70 n.24)—could possibly qualify as a "proceeding" for the purposes of the criminal obstruction statutes, which must be narrowly construed in Andersen's favor. *See Aguilar*, 515 U.S. at 600.

None of the cases the government cites (at DOJ Br. 92-93 n.34) held that a preliminary inquiry conducted by government investigators without subpoena power constitutes an "official proceeding" within the meaning of the statute. Instead, a number of cases, including one cited by the government, recognize that the authority to secure subpoenas represents an appropriate line of demarcation

between a "proceeding" and other matters within the jurisdiction of an agency. *See, e.g., United States v. Senffner*, 280 F.3d 755, 761 (7th Cir. 2002) (noting that authority to issue subpoenas and administer oaths distinguishes an SEC investigative proceeding "from a mere police investigation"); *United States v. Batten*, 226 F. Supp. 492 (D.D.C. 1964).[10]

* * *

[10] The government did not contend that any of the alleged acts of persuasion upon which the indictment is based occurred after October 31, 2001, the date on which Andersen became aware that an investigative "proceeding" with subpoena powers had been authorized by the SEC.

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No. 04-368

In the Supreme Court of the United States

ARTHUR ANDERSEN LLP,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether Arthur Andersen LLP's conviction for witness tampering under 18 U.S.C. § 1512(b) (2000) must be reversed because the jury instructions upheld by the Fifth Circuit misinterpreted the elements of the offense.

RULE 29.6 STATEMENT

Petitioner Arthur Andersen LLP is a limited liability partnership. It has no parent corporation and no publicly held company owns stock in the partnership.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit (Pet. App. 1a-34a) is reported at 374 F.3d 281.

JURISDICTION

The Fifth Circuit affirmed the conviction on June 16, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix to the Petition for Certiorari (Pet. App. 63a-77a) reproduces the text of 18 U.S.C. §§ 1503, 1505, 1512, and 1515.

STATEMENT OF THE CASE

This case arises out of the conviction of Arthur Andersen LLP ("Andersen") for witness tampering. The Fifth Circuit affirmed the conviction, on the theory that Andersen engaged in "corrupt[] persua[sion]" in violation of 18 U.S.C. § 1512(b) (2000) when it encouraged employees to comply with the firm's standard document retention policy in the month before the SEC initiated a formal investigation into Enron Corporation. Pet. App. 2a-7a, 25a. That policy required Andersen employees to prepare and retain final work papers that fully and accurately document their audit conclusions, and then to discard unnecessary drafts and notes. Andersen employees who compiled the Enron work papers did not seek to excise damaging facts or to conceal knowledge of a crime, and they genuinely believed that compliance with the policy prior to initiation of an SEC proceeding and receipt of a subpoena was lawful and proper.

For more than a century, it had been settled law that destruction of documents prior to the initiation of judicial or agency proceedings is not obstruction of justice. The Government accordingly sought to circumvent the limits on the crime of obstruction by indicting Andersen for "witness tampering" under 18 U.S.C. § 1512, which prohibits attempts to "kill," "threaten[]," or "corruptly persuade[]" potential witnesses. In the Government's view, it was

perfectly lawful for Andersen's employees to comply with the document retention policy themselves, whatever their motive might be, prior to the start of a proceeding. But it was criminal "corrupt[] persua[sion]" to urge *others* to comply with the policy if the request was even partially motivated by an intent to "impede the fact-finding ability" of some possible future investigation. The Fifth Circuit agreed. That expansive and illogical interpretation of the statutory language criminalizes common conduct undertaken without any consciousness of wrongdoing. This Court should reverse the conviction and remand with instructions to enter a judgment of acquittal. Arthur Andersen did not commit a crime.

Proceedings In The District Court

1. Andersen was indicted on March 7, 2002, in the Southern District of Texas. JA 134.[1] The indictment charged a single count of witness tampering, alleging that between October 10 and November 9, 2001, Andersen "corruptly persuade[d]" its employees to destroy documents with the intent to impair their availability in an "official proceeding[]," in violation of 18 U.S.C. § 1512(b)(2) (2000). JA 139.[2] Andersen objected to the jury instructions concerning two key elements of the offense. First, the court instructed the jury that the phrase "knowingly ... corruptly persuades" means any persuasion even partially motivated by an "improper purpose" to "subvert, undermine, or impede the fact-finding ability of an official proceeding" even if "Andersen honestly and sincerely believed that its

[1] Citations to "R." refer to the record filed in the Fifth Circuit, "Tr." to the trial transcript in the district court, "GX" to the Government's exhibits, "DX" to Arthur Andersen's exhibits, "JA" to the Joint Appendix, and "Pet. App." to the Appendix to the Petition for Certiorari.

[2] The statute authorized ten years imprisonment if the defendant "knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ... cause or induce any person to ... alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(b)(2)(B) (2000).

conduct was lawful." JA 212-13. Andersen repeatedly objected, and requested a standard instruction defining "corruptly" to require proof of improper means of persuasion or inducement to unlawful acts, and at the very least consciousness of wrongdoing. *See* R. 146, 431, 440, 912, 917; Tr. 4316. At every turn, however, the Government opposed any wording that might permit the jury to consider whether Andersen possessed anything resembling traditional *mens rea*—presumably because it could not possibly prove that Andersen used wrongful means or asked employees to engage in unlawful acts.[3]

Second, the district court instructed the jury that the term "official proceeding" included the SEC's performance of any "investigative functions" whether "formal [or] informal," (JA 211) and told them that an "official proceeding" includes a "proceeding *or* [an] investigation." JA 213 (emphasis added). Andersen objected because both the obstruction statute and the SEC's own regulations define official proceeding in a way that excludes informal investigations conducted by the staff—who have no power to subpoena documents or compel testimony until a formal investigation is begun by a vote of the Commission. JA 144; R. 426-29; Tr. 571, 574-75. In addition, Andersen proposed instructions designed to require the jury to find a close nexus between an employee's reminder to follow the document retention policy and a future SEC proceeding. JA 143; R. 424-26, 938-39; Tr. 4339-45. The district court instead instructed the jury that the Government did not have to prove that the "corrupt persuader" had any

[3] The Fifth Circuit Pattern Jury Instruction for Section 1503, which the Court relied upon when endorsing the Government's requested instruction (R. 917), defined corruptly as "knowingly and *dishonestly*, with the specific intent to subvert or undermine the integrity of the court proceeding." *See* Fifth Circuit Pattern Jury Instruction 2.67 (2001) (emphasis added). The Government insisted on significant departures from the pattern instruction: excluding "dishonestly," and adding "impede" to the phrase "subvert or undermine." Tr. 4316-19, 6310-16. Andersen requested "dishonestly" and objected to "impede" (Tr. 4316-17; 6311-12), but the Court sided with the Government. JA 212.

particular proceeding in mind or knew that a future proceeding or subpoena was likely. The jury was told: "The Government *need only prove* that Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, that is, a regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served." JA 213 (emphasis added).[4]

The jury regarded the case against Andersen as close and difficult. It deliberated for seven full days, repeatedly sought guidance from the court, and then declared itself deadlocked. Tr. 6695; R. 208-18. The court delivered an *Allen* charge (Tr. 6813-16) and after three more days of deliberation, the jury returned a guilty verdict. Pet. App. 2a. Andersen moved for a judgment of acquittal, on substantially the same grounds as presented herein (R. 1370-79), which the district court denied. R. 1449-52.

Evidence at Trial

Andersen was responsible for auditing Enron's publicly filed financial statements. On November 8, 2001, Enron announced a restatement of its income for preceding periods. Tr. 4583. Later that day, the SEC disclosed to Andersen that it had begun a formal investigation of Enron and issued a subpoena seeking access to Andersen's records. The Government contended at trial that certain Andersen partners had engaged in unlawful witness tampering by "corruptly persuad[ing]" employees to comply with the firm's document retention policy through communications made between October 10 and October 26, 2001.[5] It also asserted post-trial that an in-house lawyer "corruptly persuade[d]" a colleague to "alter" a document by

[4] The Government even objected to Andersen's request for an instruction that the proceeding had to relate to Enron, and again the Court sided with the government. R. 1122, 1142; Tr. 6296-99.

[5] Although the indictment period reached to November 8, the last act of "corrupt persuasion" identified by the Government in either the closing statements or their briefs to the Fifth Circuit occurred within a few days after October 23. *See* Tr. 6434.

suggesting edits to his draft memorandum. JA 215-16.

The Fifth Circuit's opinion summarizes evidence that the jury might have relied upon to conclude that one of these Andersen partners (the "corrupt persuaders") requested compliance with the document retention policy, at least in part, for the purpose of "imped[ing] the fact-finding ability" of a future SEC proceeding. The record demonstrates, however, that Andersen must be acquitted if the jury should have also been required to find solicitation of unlawful acts, persuasion through improper means, consciousness of wrongdoing, or knowledge that an SEC subpoena was probable at the time of the relevant conduct. The central evidence germane to those issues follows.

1. As noted above it was not obstruction of justice for any individual employees to discard documents themselves during this period. And the jury could not have found that Andersen employees asked coworkers to violate the law by concealing criminal activity at Enron. Although some Andersen employees regarded Enron's financial reporting as "aggressive" (Tr. 1119, 5530), they uniformly testified that they did not know until after the alleged acts of corrupt persuasion that Enron had engaged in criminal conduct. *See, e.g.*, Tr. 866-67, 1228, 1315-16, 1330-31, 2021-23, 3287-88.

That testimony is corroborated by the Government's own allegations concerning Enron's collapse. The Government has never charged Andersen (or any Andersen partner) with any violation of the securities laws in connection with Enron. It has instead filed a series of indictments against Enron executives charging that they lied to the public and to Andersen. *See, e.g.*, Superseding Indictment, *United States v. Causey, Skilling, and Lay*, No. H-04-25 (S-2), at ¶ 5 (S.D. Tex. Jul. 7, 2004). Enron executives employed "secret oral side-deals, back-dated documents, disguised debt, material omissions, and outright false statements," and made "false statements to auditors." *Id.* ¶¶ 28, 107-09. Within days of discovering one of these "secret ... side-deals" concerning a special purpose entity named "Chewco," Andersen directed Enron to restate its

earnings and issue a press release. Tr. 5924-32, 6131-33.[6]

2. There was also substantial evidence that Andersen employees did not know that an SEC proceeding seeking Andersen documents was probable at the time they requested compliance with the policy.

First, Andersen employees were aware that the SEC was likely to request information *from Enron* during the fall of 2001 but they did not expect the SEC to initiate proceedings against Andersen, or to seek access to Andersen's audit files, unless Enron had to restate its earnings. JA 158-89; Tr. 1445-49, 5896, 6087.[7] The accuracy of this expectation was borne out by events.

SEC staff in Fort Worth began an undisclosed "matter under inquiry" ("MUI") concerning Enron in August of 2001 based on a Wall Street Journal article. As part of this inquiry, the SEC sent a letter to Enron on October 17, seeking voluntary disclosure of information concerning transactions between Enron and related parties. *See* JA 103-06. Andersen first learned of this SEC inquiry when Enron forwarded Andersen a copy of the letter on October 19. Pet. App. 6a.[8] The SEC's request for information was not directed to Andersen, and there was no evidence that Andersen discarded documents Enron needed to respond to this informal inquiry.[9]

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[6] The Government conceded in its closing that Enron withheld from Andersen critical information concerning Chewco. Tr. 6386; *see also* Tr. 2021-22 & 2031-32, 5919-20.

[7] Andersen did not expect the SEC to seek access to its records if Enron merely had to restate its balance sheet (JA 204-05), an event of far less significance to investors than an income restatement.

[8] An SEC witness testified that the MUI concerned Enron, not Andersen (Tr. 567-69), and that "[m]ore than half" of the SEC's informal inquiries "are closed without becoming a formal investigation" authorized by the Commission. Tr. 518.

[9] The securities laws and regulations did not require Andersen to maintain any documents prior to the receipt of the subpoena. Tr. 563-64, 582. The SEC later promulgated Rule 2-06 of Regulation S-X pursuant to Section 802 of the Sarbanes-Oxley Act to regulate auditor document retention. *See* 148 Cong. Rec. S7419 (daily ed. July 26, 2002).

On October 30, the SEC commenced a formal investigation of Enron and sent a second letter to Enron identifying disclosures that it believed "Enron should provide to the public," but the letter did not request production of documents from Enron or Andersen. JA 122. Nor did it give Andersen any reason to expect a request for its documents. The SEC did not contact Andersen or request access to its records until Enron restated its income on November 8 as an outgrowth of the Chewco revelations. GX 1108C; Tr. 4583. As the SEC official handling the MUI explained at trial, he had not requested information from Andersen prior to that date because the SEC only needed information from the auditor in the event of a restatement. Tr. 783-84.

Second, Andersen did not become aware of the facts that precipitated Enron's income restatement, and thus the SEC's subpoena, until the first week in November. Commencing in September of 2001, a team of Andersen partners that included David Duncan, the lead engagement partner for Enron, was evaluating potential problems with Enron's financial statements. Pet. App. 4a; Tr. 4543. Until the last few days of October, the consultation team's central concern was Enron's use of a particular accounting methodology to measure potential impairment of notes received from entities known as the Raptors. Tr. 1353-55, 2307, 4535-38, 4577; Pet. App. 3a-4a. Andersen recognized that the impairment issue had the potential to require an income restatement, but employees testified without exception that they could not predict the outcome because it depended on the results of calculations using alternative methodologies. Tr. 959, 1794, 4580, 5424-25. Once a permissible methodology was applied, the Raptors' impairment issue turned out to be a "non-event" because no restatement was necessary. Tr. 4529-30, 5645-46. Duncan testified that he was fairly sure that the Raptors issue would not require a restatement more than a week before he requested compliance with the policy. Tr. 1794-95.

Very late in October, however, Andersen began to discern other potential problems. Tr. 2031, 2056, 1934. On November 2, 2001, Andersen received documents from Enron's counsel which established that Enron had concealed from Andersen secret side-deals concerning Chewco. Tr. 6148-49. Andersen completed its evaluation of this issue on November 5; concluded that a restatement was necessary; and required Enron to file a form 8-K announcing that restatement. Tr. 5918-25.[10] A jury accordingly could have found that Andersen did not believe that an SEC subpoena was probable until at least a week *after* the acts at issue.

3. A properly instructed jury could not have found that any of the Andersen partners whose conduct is at issue used improper means of persuasion or had any consciousness of wrongdoing.

Nancy Temple. Nancy Temple was an in-house lawyer in Chicago who was asked to join the consultation team charged with resolving the Raptors issues. Pet. App. 4a. Temple had been a litigation partner at Sidley & Austin before joining Andersen's Chicago office. She was not indicted but nevertheless became "the most central individual" in the Government's case and in the Fifth Circuit's opinion. Tr. 2538; Pet. App. 4a-7a.

Temple was asked to advise the consultation team concerning the proper procedure for correcting a memorandum in the audit work papers. The memorandum erroneously stated that the Professional Standards Group ("PSG") had concurred with the engagement team's conclusion that Enron's methodology for measuring the Raptors' impairment complied with accepted accounting principles. Temple consulted the document retention policy and directed the engagement team to retain the original erroneous version in the work papers, and to document

[10] The 8-K, filed on November 8th, also disclosed a restatement of Enron's balance sheet that was required due to a "good faith mistake" by Enron. Tr. 2033-34, 2020. This balance sheet reclassification concerned a reduction in shareholder equity that Enron had already announced on October 16. Tr. 1844.

corrections in supplemental memoranda so that there would be "a trail from the old memo to the amended memo." Tr. 2440-41; GX NT1009.

Shortly after providing this advice concerning the need for accurate documentation, Temple sent two emails that the Government characterizes as criminal acts of "corrupt[] persua[sion]." On October 12, she sent an email to the Practice Director for Andersen's Houston office stating that "[i]t might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy." JA 94. The Practice Director forwarded her email to David Duncan. The second email, which contained only a link to the retention policy, was sent on October 19 to John Stewart, a PSG partner. GX 1019A. Stewart testified that he did not take this email as "any message ... to destroy documents," but rather as "a courtesy" because he had mentioned that he did not have a copy.[11] Tr. 5498. A PSG partner, Amy Ripepi, also testified that, on an October 20 conference call, Temple reminded participants "to make sure to follow the policy." Pet. App. 6a. Ripepi explained that "[i]n my mind" this suggestion was "a follow-on from the conversations that we had had earlier about the need to ... get accurate documentation into the record." Tr. 1471.[12]

There is simply no evidence that Temple believed that there was anything wrongful about these requests. Temple's colleagues told the jury they had no cause to question her integrity, and emphasized that she instructed them to ensure that the firm's accounting and its work papers were entirely accurate. Tr. 4522, 4525-26, 4608-12,

[11] Stewart explained that he had met with Temple earlier in the month to discuss the retention policy because he wanted to retain some preliminary materials. Temple offered to preserve the documents for him, and did so. Tr. 5458-63, 5491-95, 5498.

[12] She also testified that the participants only anticipated a "Comment Letter" from the SEC, which she described as simply questions from SEC lawyers or accountants that *never* request access to an accounting firm's documents. Tr. 1447-49; *see also* Tr. 2493-94, 2649-50, 5889.

5512-13, 5909-15, 5957-58. Moreover, the document retention policy she reminded her colleagues to follow protected the integrity and accuracy of audit work records by requiring preservation of any documents an experienced auditor would require to understand the audit performed. JA 45-46.[13] It required preservation of "[i]nformation having relevance to our opinion or findings" (JA 47), while calling for destruction of "drafts and preliminary versions ... superseded workpapers" (*id.*), and "gratuitous comments or personal information." *Id.* at 45.[14]

Nor is there evidence that Nancy Temple intended to exceed the bounds of the law when she sent Duncan an email on October 16 suggesting that he revise a draft memorandum. JA 95. Duncan's memorandum, labeled a "first draft," memorialized Andersen's doubts about whether Enron should characterize certain charges as "non-recurring" in a press release. JA 100-01. Temple recommended deletion of "language that might suggest we've concluded the release is misleading." JA 95. But that suggestion was validated by Duncan's own testimony that the consultation team *had not* "concluded" that the release was "misleading"—a term with legal significance under the securities law. Tr. 1798, 1363-64. Nor did her edits hide

[13] She explained in an October 14 email that compliance with the policy by discarding preliminary drafts serves the firm's legitimate interests by "mitigat[ing] the risk of confusion at a later date." DX 476.

[14] The policy called for retention of all documents under certain circumstances. Although the retention policy (JA 42-92) and an Andersen policy relating to notification of the law department (JA 28-41) used several verbal formulations, it was reasonable to read the policy to permit destruction of extraneous documents until Andersen was either served with a subpoena or notified that it would be sued. *See, e.g.*, JA 65 (retention policy: "In the event [Andersen] is advised of litigation or subpoenas"); *id.* at 44 ("threatened litigation"); JA 29 (notification policy distinguishing between when litigation "has been threatened" and when it "is judged likely to occur"). And that is how the head of the Enron engagement team, the head of the Houston practice group, and the employees who attended the October 23rd meeting understood the policy. *See* Tr. 1665, 3331; GX 1010B.

Andersen's concerns: she retained sentences advising that "[Andersen] had strong concerns that the presentation of the charges as non-recurring could be misconstrued or misunderstood by investors," and only proposed removal of a reference to past SEC actions based on press releases. JA 98-99 (draft reflecting Temple's edits). Far from evidencing any effort to cover up anything regarding the press release, Temple's email instead promised further consultation "within the legal group" (JA 95), and she actually consulted with outside counsel on the subject. GX 1018C.

The jury also could have found that Temple did not believe that an SEC subpoena was probable when she engaged in these allegedly corrupt acts between October 12 and October 20. There is certainly ample evidence that Temple took steps throughout October to prepare for possible proceedings in the event the Raptors' issues required an income restatement, but there is also ample evidence that she was only preparing for the *possibility* of an SEC proceeding. On October 12, Temple entered the Enron matter into Andersen's internal tracking system. Under the category of "Type of *Potential* Claim" she selected the designation "Professional Practice — Government/Regulatory Investigation" from a list of several options. JA 127 (emphasis added). Her entry explained, however, that the issue of concern related to the accounting for the Raptors and that the firm was still "reviewing acceptable alternatives and determining whether restatement is necessary." JA 126.[15]

David Duncan. Duncan pled guilty to witness

[15] On October 9, Temple prepared notes stating that "some SEC investigation" was "highly probable." Pet. App. 5a; JA 93. At most, these notes might suggest that she expected the informal investigation of Enron that she learned about ten days later. They do *not* suggest that she believed that a formal investigation involving Andersen was "probable." To the contrary, the notes confirm that there was only a "reasonable possibility" of a "restatement." Absent a restatement, a formal investigation would not be "highly probable." *See supra* at 6-8 & n.9.

tampering and testified for the Government at Andersen's trial. Tr. 1665-67. The Government viewed Duncan's October 23 meeting with his managers as "the main impetus for the destruction." Tr. 6432. At that meeting Duncan told managers to complete their audit files and bring them into compliance with the document retention policy. Tr. 1891-92. Duncan explained that his team's compliance had been "irregular" due to the press of time (Tr. 1883), and that he understood the importance of completing the work papers in accordance with the policy. JA 156-57. Managers in attendance testified that they did not interpret his comments as a direction to hide facts (Tr. 3325, 4965-66), and the fact that the request for compliance was discussed openly at a general meeting, where the SEC's informal inquiry was also discussed, itself belies any consciousness of wrongdoing on Duncan's part.[16]

Duncan acknowledged that he thought there was some "potential" that the "SEC might want some of our documents" (Tr. 2478-80) and that this "potential" was "on my mind at the time I instructed people to do this." Tr. 1907-08.[17] But he also told the jury that he believed that urging compliance with the policy "was perfectly appropriate ... because [Andersen] had neither been sued nor served with a subpoena" (JA 160; *see also* JA 159; Tr. 2001-04, 2087), and that he regarded a "large part of the exercise" as "mak[ing] sure we [had] the complete picture [in the workpaper documents] in case the SEC wants to look at this one day." JA 162. He nevertheless pled guilty

[16] Duncan repeatedly characterized the documents he discarded as "extraneous," not work papers (JA 164-66), giving as examples prior drafts, "[r]epetitive memos," and "[m]eeting agendas." JA 167. He testified that early drafts are written by "less experienced" persons, and they were to be deleted because they could be "misleading" and "confusing." Tr. 2069-70.

[17] Duncan never testified that he expected an SEC subpoena or considered it "probable." He repeatedly testified that he believed it no more than a "possibility" until early November. Tr. 1780, 1860, 1904-05, 1908, 1919, 2050, 2480.

because the Government convinced him that his conduct could violate § 1512(b) without consciousness of wrongdoing. Tr. 2004-05.

Attendees understood that the SEC was conducting an informal investigation of Enron, but nevertheless shared Duncan's view that it was proper to comply with the policy at this time. *See, e.g.*, JA 159; Tr. 3330-31, 3350, 4900. Consistent with Duncan's guidance, they attempted to "complet[e] [the] audit documentation" by "making sure everything that went into the accounting issues and the conclusion was documented and available in the work papers." Tr. 4918. The concern was "one of inclusion rather than exclusion." *Id.* Although the team shredded a very large volume of documents in the process of compiling the work papers over the course of the next week, employees testified that they did not seek to destroy or fail to preserve any harmful information; the types of documents shredded were routine and extraneous.[18] As one manager explained, once an audit file had been properly compiled, "it's all in the audit work papers" so "you don't need" anything else. Tr. 3336.[19] The Government, after interviewing dozens of Andersen witnesses, calling many at trial, and having access to all of Andersen's files including copies of preserved and recovered emails, never identified a single document of importance to its inquiry that was not preserved. Indeed, in its closing statement, the Government told the jury there was one such document (Tr. 6385-86), but the court had to issue a curative instruction when Andersen pointed out that the document had actually been preserved and produced to the SEC. Tr. 6456-57, 6459-60, 6472-73.

The Government has suggested that its cooperating

[18] Andersen proffered evidence at trial that the volume of shredded documents represented less than 3% of the records retained by the engagement team. Tr. 5468-71; R. 1115-16. The district court held this evidence inadmissible and the Fifth Circuit affirmed. Pet. App. 7a-9a.

[19] Employees would incorporate the content of important notes and emails into file memoranda or preserve them directly in the work papers. *See* Tr. 3335-36, 4693-99.

witness may have knowingly engaged in wrongdoing because two Andersen employees raised concerns about document retention with him in late October. Both of these discussions occurred *after* Duncan's requests for compliance with the policy, and the individuals involved did not form the impression that Duncan believed that his conduct was improper.[20]

Tom Bauer. Tom Bauer was an Enron engagement partner who requested his managers to comply with the document retention policy at a meeting on the morning of October 23, 2001. Tr. 3236-37. Patti Grutzmacher testified that a few days after this meeting, she asked Bauer about priorities, and got the impression that compliance with the policy was a high priority. Tr. 3242-43. Her testimony makes clear, however, that she understood requests to comply with the policy to mean that she should be completing her audit files to help provide accurate information and *not* "keeping documents away" from the SEC. Tr. 3348-50. She testified that she "didn't have anything that [the SEC] would find troubling or anything to hide." Tr. 3369-70. Indeed, Bauer made clear to

[20] On October 26, John Riley—an Andersen partner and former SEC official—was in the Houston office, heard the shredder running, and told Duncan that it would not be a good time to be shredding lots of documents. JA 198-99. Duncan explained that they were only shredding "routine" materials and Riley made no further comment. Tr. 5901-03. Riley confirmed that he was not retaining all of his own documents at the time and that he regarded the conversation as "innocuous." JA 206-09. There was no evidence that any non-routine materials were destroyed. On October 31, David Stulb, a forensics investigator for Andersen, met with Duncan. He recalled seeing Duncan pick up a document, quote the words "smoking gun" from its cover email, and start to remove the email, saying "we don't need this." JA 178-82; Tr. 3867-69. Stulb explained, however, that the incident was "innocuous" and Duncan was "appreciative" of Stulb's caution that the document should be preserved and did not appear to think "he had done anything wrong." JA 181-87. Duncan testified that he did retain a copy of the memo in his files. Tr. 2341; *see also* Tr. 4430-40 (multiple copies of the memo were produced to the Government). Stulb further testified that he called Temple to tell her Duncan needed guidance on document retention, but did not recount the incident that made him think Duncan needed guidance. JA 191-92.

Grutzmacher that documents should be discarded only when the policy called for it, explaining to her on a separate occasion, but "in the same general time frame," that "if he ever talked to us about getting rid of documents that it would always be along the lines of being in compliance with the firm's retention policy." Tr. 3244. Grutzmacher made clear that she did not believe that she was being asked to do something wrong (Tr. 3248-49), and another manager in Bauer's group confirmed that he did not understand the request as a coded order to destroy documents. Tr. 5009-13.

Michael Odom. On October 10, 2001, Odom, the practice director for the Houston office, spoke at a general training meeting attended by eighty-nine Andersen employees, only ten of whom were on the Enron engagement team. Tr. 3197-98. At that meeting, Odom discussed the document retention policy briefly and told managers that "when there's litigation outstanding," no documents may be destroyed, "but if [documents are] destroyed in the course of the normal policy and litigation is filed the next day, that's great." GX 1010B. The Fifth Circuit acknowledged that Odom's "remarks were unrelated to Enron." Pet. App. 27a. Yet the jury may have relied on this evidence to convict. After having declared themselves deadlocked and being given an *Allen* charge, the jury asked to view a videotape of Odom's presentation (Pet. App. 27a), and was permitted to do so. Tr. 6834.[21]

Proceedings On Appeal

The Fifth Circuit concluded that the district court properly interpreted the elements of the offense.

The Fifth Circuit held that "corruptly" should be defined "in terms of improper purpose despite the dim light it casts upon its meaning, its circularity aside." Pet. App. 19a. The Court was "unwilling to follow the Third Circuit's lead in

[21] The Government also attributed acts of corrupt persuasion to Lawrence Reiger, another Andersen Partner, because he sent two emails discussing the document policy. Tr. 6430-31. Neither discussed Enron or was circulated to the Enron engagement team, and one was sent ten days after the period covered by the indictment. GX 1015A; GX 1120A.

imposing a requirement for an additional level of culpability on Section 1512(b)." *Id.* at n.17. The Court also reasoned that consciousness of wrongdoing is irrelevant to a finding of "corrupt[] persua[sion]" because "knowledge of one's violation is not an element of § 1512(b)(2)." Pet. App. 29a.

The Fifth Circuit also rejected Andersen's challenge to the "official proceeding" instructions. It recognized that it had previously described the nexus mandated by § 1512 to require proof of an "'intent to affect ... some particular federal proceeding that is ongoing or is scheduled to be commenced in the future.'" Pet. App. 26a (quoting *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir.), *cert. denied*, 501 U.S. 1209 (1991)). It nevertheless characterized that statement as "dicta" (*id.*), and found it sufficient that this case was "tried on the theory" that Andersen intended to impede "a proceeding of the SEC." *Id.* at 27a-28a. The Court did not address Andersen's further argument that the instructions erroneously defined an "official proceeding" to include informal SEC investigations, except to acknowledge that "[p]ossible proceedings" only "became a reality on November 8, 2001" when Andersen received a subpoena. Pet. App. 5a.

SUMMARY OF ARGUMENT

It is plain as day that the Government did not charge Andersen with obstruction of justice for discarding documents during the relevant time period because no official proceeding of the SEC was pending. This Court has held for more than a century that "a person lacking knowledge of a pending proceeding necessarily lack[s] the evil intent to obstruct." *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (citing *Pettibone v. United States*, 148 U.S. 197, 207 (1893)).

The United States attempted to evade that settled law by instead charging Andersen with "witness tampering," on the remarkable theory that although it was perfectly lawful for Andersen to have a document retention policy that preserved only the final audit work papers, and perfectly lawful for Andersen's employees and professionals to follow

that policy, it was somehow a serious felony for Andersen's in-house attorney and supervisors to remind its employees of the policy. The Government also argued that Nancy Temple's proposed edits to David Duncan's draft memorandum constituted criminal "witness tampering," because in its hindsight view the SEC would have wanted to see Duncan's first draft. It invoked 18 U.S.C. § 1512, which criminalizes killing, intimidating, threatening, and "knowingly ... corruptly persuad[ing]" any person with the intent to make evidence unavailable to an official proceeding. Its theory, accepted by the courts below, was that all persuasion is "knowingly ... corrupt[]" and criminal if it is motivated in part by a desire to impede the fact-finding ability of a potential future government proceeding, even if the speaker does nothing more than politely urge the listener to engage in lawful conduct. That interpretation is seriously flawed.

First, the Government's basic premise is simply wrong. There is nothing inherently "corrupt" or wrongful about an intent to impede future government fact-finding within the bounds of the law. Americans regularly engage in a wide range of conduct designed in part to influence or limit the information that reaches government proceedings; that is one of the reasons that our legal system is frequently described as "adversary." Some cases decided under 18 U.S.C. § 1503 have permitted a presumption that acts specifically intended to interfere with the fact-finding of a *pending judicial proceeding* are inherently "corrupt." But that is not settled law even under § 1503, and outside that unique context this Court has recognized that there is nothing "obviously evil" or "inevitably nefarious" about acting "for the specific purpose of depriving the Government of ... information" that it has sought to obtain. *Ratzlaf v. United States*, 510 U.S. 135, 144-46 (1994). Extending a presumption of that nature to the federal agency context "would undoubtedly criminalize some innocent behavior" and violate both Due Process fair warning principles and the First Amendment. *United States v. North*, 910 F.2d 843, 882

(D.C. Cir.), *modified on other grounds*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

Second, it would be an extremely poor reading of this statute. The word "corruptly" can have either a transitive meaning (by means of "corrupting" another person) or an intransitive one (motivated by a "corrupt" purpose). The *only* argument for an intransitive reading in § 1512 is the flawed analogy to § 1503. "Corruptly persuades" appears in § 1512 in a list of unlawful *means*, not *purposes*. It is thus more naturally read to prohibit only persuasion that "corrupts" the listener by inducing her to accept a bribe or otherwise break the law. That is clearly more consistent with the obvious purpose of the statute, which is otherwise directed at killing, coercing, intimidating or harassing witnesses. And § 1512 separately requires a specific intent to make documents or testimony unavailable to an official proceeding; defining "corruptly" as another purpose requirement thus makes little sense, and defining it as a purpose *to impede an agency's fact-finding ability* renders it superfluous. The Government's reading also produces a line between criminal and non-criminal behavior that is so arbitrary and absurd that it cannot be what Congress intended. And even if "corruptly" is given an intransitive meaning, the purpose that violates § 1512 must then include some consciousness of wrongdoing. Persuasion is not "knowingly ... corrupt[]" if the speaker sincerely believes that it is not wrongful.

Third, like the traditional obstruction statutes, § 1512 applies only when the defendant specifically intended to make documents or testimony unavailable to a particular *official proceeding*, defined as a judicial proceeding, "a proceeding before the Congress," or "a proceeding before a Federal Government agency which is authorized by law." 18 U.S.C. § 1515(a)(1). Interference with the fact-finding ability of law enforcement or preliminary agency investigations is not sufficient. Neither is an abstract desire not to retain documents because they might be relevant to some possible future proceeding. As this Court recognized

in *Aguilar*, identifying true "corrupt" interference with an official proceeding thus requires careful attention to the "nexus" between the defendant's conduct and the proceeding alleged to have been obstructed. The instructions given here eliminated that nexus requirement.

Finally, even if these questions were close, the rule of lenity requires that all ambiguities must be resolved in defendants' favor. The doctrine of constitutional doubt also forbids an interpretation of vague statutory language that would criminalize a broad range of innocent conduct, including constitutionally protected speech, without fair warning. A Senate Report on the Sarbanes-Oxley law, portions of which were passed because Congress recognized that Andersen's conduct was not clearly criminal under existing law, noted that "in the current Andersen case, prosecutors have been forced to use the 'witness tampering' statute ... and to proceed under the *legal fiction* that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves."[22] Lenity and fair warning principles forbid criminal prosecutions based on "legal fictions." Whether particular conduct is criminal should never be debatable, or a surprise. The theory of this prosecution criminalized conduct commonly understood to be lawful, including the document retention policies in place at almost every American corporation or professional firm of any size. And the jury may well have rested its verdict on an email from Nancy Temple which "offered such common legal advice that the chairman of the American Corporate Counsel Association wrote in a letter to his members: 'Who amongst us has not thought: There but for the grace of God go I.'"[23]

None of these errors could be harmless. There is *no* evidence that any of the partners involved used unlawful

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[22] S. Rep. No. 107-146, at 7 (2002) (emphasis added).

[23] Dana E. Hill, Note, *Anticipatory Obstruction of Justice: Pre-emptive Document Destruction Under The Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519*, 89 Cornell L. Rev. 1519, 1552 (2004).

means of persuasion, urged anyone else to break the law, or believed that their conduct was wrongful. And the record also requires the conclusion that they did not believe that an SEC subpoena was probable at the time the acts of persuasion occurred. Indeed, there is no reason to assume that a jury that deliberated for ten days and declared itself deadlocked—despite a guilty plea for the same conduct entered by David Duncan—would have convicted if the instructions had been different in any material way.

This is not a case about big business or being tough on crime; it is about the right to conduct one's life and business in a manner understood to be lawful, and to receive fair warning when that law is changed. No one at Andersen had the "evil-meaning mind" necessary to justify criminal punishment. This conviction was secured by creative lawyering on the part of government prosecutors, at the expense of sound statutory interpretation, fair warning principles, and the basic goals and values of the criminal law. It did a great injustice to the tens of thousands of Andersen partners and employees who were permanently harmed by the firm's destruction. And it raises a cloud of doubt about routine advice that Americans give to colleagues, clients, family, and friends about how to protect their own interests within the bounds of the law. It must be reversed.

ARGUMENT

I. THE JURY WAS IMPROPERLY INSTRUCTED ON THE DEFINITION OF "KNOWINGLY ... CORRUPTLY PERSUADES"

A. An Intent To Impede Governmental Fact-Finding Is Not Inherently Corrupt

Under the definition of "knowingly ... corruptly persuades" used in this case, the jury was not required or even permitted to consider whether Andersen employees sought to induce unlawful acts, used improper means, or believed that their conduct was wrongful. The jury was instead instructed that it must find that any purpose to "impede the fact-finding ability" of a possible SEC

proceeding was "improper" and therefore corrupt *per se* within the meaning of § 1512(b). Pet. App. 48a-49a. The Fifth Circuit's decision to uphold that interpretation of the statute rested on the premise that "courts ha[ve] uniformly defined 'corruptly' in [18 U.S.C.] § 1503" this way. Pet. App. 23a. As set forth *infra*, the language and history of § 1512 foreclose this interpretation no matter what "corruptly" means in § 1503. But it bears emphasis at the outset that the Fifth Circuit is mistaken. A mere intent to impede the fact-finding ability of government proceedings has never been enough to make conduct (let alone truthful speech) criminal in this country. That common understanding stems from many sources, including the adversarial nature of our legal system, and long-standing limitations on the crime of obstruction that foreclose the Fifth Circuit's view.

First, it makes little sense to conclude that destruction of any potentially relevant documents prior to the pendency of a proceeding is inherently corrupt when Congress chose not to criminalize that conduct for the century preceding David Duncan's meeting with his managers. This Court held in 1893 under a predecessor to § 1503 that "while, with knowledge or notice of [a pending proceeding], the intent to offend accompanies obstructive action, *without such knowledge or notice the evil intent is lacking.*" *Pettibone*, 148 U.S. at 207 (emphasis added). A defendant who intentionally interferes with a mere police investigation (whether by lying to the police or destroying documents) therefore "necessarily lack[s] the evil intent to obstruct" justice, *Aguilar*, 515 U.S. at 599, unless he knows that a judicial proceeding is pending and intended to obstruct *it*. When Congress adopted 18 U.S.C. § 1505 to address obstruction of congressional and agency proceedings, it imposed the same limitation: destruction of documents to impede a future agency proceeding *is not criminal* because the defendant must know that the proceeding is "pending."

Against that backdrop, Americans have long understood that it is not obstruction of justice to dispose of documents that might be of interest to some future official

proceeding.[24] Virtually all corporations and professional firms have adopted document retention policies that permit or require the periodic destruction of documents. *See* Brief for the American Institute of Certified Public Accountants as *Amicus Curiae*, at 17-18. Such policies serve multiple purposes, but one has always been to avoid the unnecessary retention of documents that could be taken out of context and used against the firm in possible future litigation or government investigations. *Id.* That is an intent to impede the fact-finding ability of a future proceeding, but until this case it has never been thought to be criminal.

Second, this Court has rejected the view that any intentional effort to impede fact finding is inherently corrupt, even when a proceeding is pending. In *Aguilar*, this Court held that the defendant was not guilty of a "corrupt[] endeavor" under § 1503 even though he lied to the FBI with the specific "intent to 'obstruct ... the due administration of justice'" with knowledge of a pending grand jury proceeding. 515 U.S. at 600, 602. If lying to the FBI with the intent to obstruct a pending grand jury proceeding is not corrupt *per se*, then surely it is not inherently corrupt to comply with a document retention policy in advance of a proceeding without consciousness of wrongdoing, particularly one like Andersen's that required preservation of thorough and accurate work papers.

Aguilar also demonstrates that courts have not "uniformly" instructed juries in § 1503 cases that "corrupt" means an "improper purpose" to impede fact finding. Pet. App. 48a-49a. The jury in *Aguilar* was instead instructed

[24] Discarding documents that the defendant knows to be evidence *of a crime* could be criminal prior to the initiation of formal proceedings. *See* 18 U.S.C. § 3 (providing that "[w]hoever, knowing that an offense against the United States has been committed, ... assists the offender in order to hinder or prevent his apprehension" is guilty as an accessory after the fact). But it is not obstruction of justice—and there has never been evidence that Andersen had knowledge of criminal behavior by Enron when the alleged acts of "corrupt[] persua[sion]" occurred. *See supra* at 5-6.

that: "'An act is done corruptly if it's done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or some other benefit to oneself or a benefit to another person.'" 515 U.S. at 616-17 (Scalia, J., dissenting); *see also United States v. Poindexter*, 951 F.2d 369, 385 (D.C. Cir. 1991), *cert. denied* 506 U.S. 1021 (1992) ("[c]ourts construing § 1503 have adopted a wide variety of interpretations" of "corruptly").

Third, any presumption that an intent to impede fact finding is inherently corrupt cannot reasonably be extended beyond the context of judicial proceedings. As the D.C. Circuit recognized in *North* under § 1505, a rule that any intent to impede *congressional or agency* fact-finding is corrupt "would undoubtedly criminalize some innocent behavior" because congressional committees are "part and parcel of a political branch of government," and "there are myriad ways of 'impeding' or 'obstructing' congressional investigations that are not in themselves corrupt." 910 F.2d at 882-83. Judge Silberman posited the example of union officials who decide "not [to] provide *any* information to [a Congressional] committee unless legally compelled," in an effort to defeat unfavorable legislation. *Id.* at 942 (Silberman, J., concurring in part and dissenting in part). Judge Silberman thought such conduct plainly innocent, and ultimately concluded that a defendant does not act "corruptly" for § 1505 unless he uses unlawful means or subjectively believes that his conduct was unlawful. *Id.* at 944.[25] The same must be true under § 1512, which unlike

[25] The D.C. Circuit majority in *North* thought the jury should "appl[y] 'corruptly' according to its usual definitions," 910 F.2d at 882, such as "depraved, [or] evil," *id.* at 881. Judge Silberman agreed but found that the instructions actually given equated "corruptly" with a mere intent to obstruct. *Id.* at 942. Several years later Congress passed a statute providing that "[a]s used in section 1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information." 18 U.S.C. § 1515(b). But the "very narrow purpose" of that provision was to

§ 1505 applies even when agency or congessional proceedings are not pending.

Finally, the interpretation of "corruptly" adopted by the Fifth Circuit would criminalize a wide variety of common conduct that is intended to impede official fact-finding within the bounds of the law. In addition to the retention policies discussed above, the instructions given here would make any of the following into a felony:

- A mother's advice to her son that he should assert his Fifth Amendment privilege not to testify before a grand jury, because his testimony would incriminate him;
- A manager's instruction to a custodian of records not to comply with a voluntary request for documents from the SEC;
- A CEO's instruction to her company's general counsel to assert, not waive, the company's attorney-client privilege in response to an SEC subpoena;
- An attorney's advice to her client to answer only the question posed and not to volunteer information; or
- An in-house attorney's suggested deletions of potentially damaging statements in a draft memorandum prepared by a colleague.

Andersen respectfully submits that none of this conduct is inherently "corrupt," or even wrongful. Examples like these, and others in the briefs of the *amici* graphically demonstrate that the Fifth Circuit's interpretation of "corruptly persuades" must be rejected.[26]

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reverse the D.C. Circuit's holding in *Poindexter* that persuading someone to lie to Congress is "corrupt" but simply lying yourself is not. *See United States v. Brady*, 168 F.3d 574, 578 & n.2 (1st Cir. 1999); 141 Cong. Rec. S7752, S7754 (daily ed. June 6, 1995) (same). Whatever the meaning of that provision may be, Congress excluded Section 1512 from its scope.

[26] In *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 406-07 (1999), for example, this Court rejected the Government's interpretation in part because it would have criminalized obviously innocent gifts of "jerseys given by championship sports teams each year during ceremonial White House visits," or "a high school principal's gift of a school baseball cap to the Secretary of Education."

B. The Fifth Circuit's Interpretation Of "Corruptly" Is Inconsistent With The Plain Language, Structure, And Purpose Of § 1512

1. The Best Reading Of "Corruptly Persuades" Requires Proof Of Improper Means Or Inducements To Violate The Law

The adverb "corruptly" has two dictionary meanings. Persuasion might be accomplished "corruptly" because the speaker intends to "corrupt" the listener, or because the speaker's own motivations are "corrupt" in some other sense. The first is frequently called the "transitive" interpretation of "corruptly;" the second is "intransitive."[27] Andersen requested a transitive interpretation: that "corruptly persuades" means "corrupting" a witness by unlawful means of persuasion or by urging them to break the law. The courts below chose an intransitive one—specifically that any persuasion is corrupt if done for the purpose of impeding agency fact-finding. The transitive reading is, however, required by the text, structure, and purpose of the statute.

a. Although "corrupt" can mean simply "depraved, [or] evil" in a general sense, by far the more common modern usage is "of debased political morality: characterized by bribery, the selling of political favors, or other improper political or legal transactions or arrangements." *Webster's Third New International Dictionary* 512 (1986). In common parlance persuasion is corrupt if it "corrupts" a public

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[27] *See, e.g., Poindexter*, 951 F.2d at 379; *North*, 910 F.2d at 940-43 (Silberman, J., concurring in part and dissenting in part); *See* 3 *Oxford English Dictionary* 974 (2d ed. 1989) ("corruptly" may mean either "by means of corruption or bribery," i.e., by means of corrupting another, or simply acting "[i]n a corrupt or depraved manner"); *American Heritage Dictionary* 423 (3d ed. 1992) (two definitions of "corrupt": Transitive verb: "1. To destroy or subvert the honesty or integrity of"; Intransitive verb: "To become corrupt"); *Webster's Ninth New Collegiate Dictionary* 293 (1987) (Transitive verb: "1a. To change from good to bad in morals, manners, or actions; *also*: bribe"; Intransitive verb: "1a. To become tainted or rotten").

official (or other person vested with a public duty) by using unlawful *means* of persuasion—such as bribery and blackmail—or by persuading the official to break the law. That was the instruction used in *Aguilar*, and for many other federal obstruction and bribery statutes.[28] That reading is also consistent with what Justice Scalia has called the "longstanding and well-accepted" meaning of "corruptly" in the criminal law: "'an act done with the intent to give some advantage inconsistent with official duty and the rights of others.'"[29] Persuasion is not "corrupt" in that sense if it uses lawful means and does not advocate unlawful conduct or seek some unlawful advantage.

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[28] For example, the legislative history of 18 U.S.C. § 1517, which criminalizes "corruptly" obstructing the examination of a financial institution, makes it clear that "corruptly" means "'with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.'" H.R. Rep. No. 101-681(I), at 174 n.5 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6580 n.5 (quoting 1 E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions* § 34.08 (3d ed. 1978)). The statute punishing "corruptly imped[ing]" the FDIC, 18 U.S.C. § 1032, has the same meaning, H.R. Rep. No. 101-681(I), at 173 n.3, *reprinted in* 1990 U.S.C.C.A.N. at 6579 n.3 (quoting Devitt and Blackmar § 34.08), as did 18 U.S.C. § 201(c)(3), the statute prohibiting corruptly bribing a public official (now § 201(b)). *See United States v. Strand*, 574 F.2d 993, 996 (9th Cir. 1978). And other federal bribery statutes define "corruptly" to mean soliciting the "violation of some duty owed to the government or to the public in general." *United States v. Rooney*, 37 F.3d 847, 852-53 (2d Cir. 1994). "Corruptly" in the Foreign Corrupt Practices Act similarly requires a violation of official duty. *See Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V. v. Schreiber*, 327 F.3d 173, 182 (2d Cir. 2003).

[29] *Aguilar*, 515 U.S. at 616 (Scalia, J., dissenting in part, concurring in part) (quoting *United States v. Ogle*, 613 F.2d 233, 238 (10th Cir.), *cert. denied*, 449 U.S. 825 (1980)); *see also Black's Law Dictionary* 311 (5th ed. 1979) (definition of "corruption"). After an exhaustive study of the § 1503 case law, the D.C. Circuit concluded in *Poindexter*, 951 F.2d at 385, that the best reading "would reach only a person who, for the purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty."

That reading is also required by *ejusdem generis*.[30] "[C]orruptly persuades" appears in § 1512(b) in a list of prohibited acts: "[w]hoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to ...." Every other item in the list is plainly a specific *wrongful act* directed at a witness, not a reference to the defendant's purpose—and every one of them is wrongful for reasons independent of the defendant's goal of keeping information away from an official proceeding. *Ejusdem generis* thus indicates that "corruptly persuades" is also a reference to wrongful conduct—such as bribing a witness or urging them to lie.

That reading (or some similar limiting construction) is also required by 18 U.S.C. § 1515(c), which provides that "[t]his chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." That provision was captioned a "Rule of Construction as to Legal Representation" in the statute, confirming (as the plain language indicates) that it is a guide to interpretation, not an affirmative defense. Pub. L. No. 99-646, § 50(b), 100 Stat. 3592, 3605 (1986). As explained in depth in the briefs for the National Association of Criminal Defense Lawyers ("NACDL") and the New York Association of Criminal Defense Lawyers as *Amicus Curiae*, defining "corruptly persuades" to mean any speech motivated in part by a desire to impede official fact-finding would criminalize much proper legal representation.

b. The structure of § 1512 and the other obstruction statutes also requires a transitive reading of "corruptly."

First, as the Third Circuit recognized in *United States v. Farrell*, 126 F.3d 484, 490 (3d Cir. 1997), "the 'improper purposes' that justify the application of § 1512(b) are already

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[30] *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). If all the words in the list are similarly specific then the proper canon is *noscitur a sociis*, but the interpretive point is the same. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

expressly described in the statute." In addition to "knowingly ... corrupt[]" persuasion, § 1512(b) also requires one of several specific intents—such as an intent to "influence ... the testimony of any person in an official proceeding," or "to ... alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(b)(1), (2)(B). Since the necessary purposes are expressly described, interpreting "corruptly" as just another "purpose" requirement makes little sense.

That problem is compounded when "corruptly" is specifically defined as a purpose to "impede the fact-finding ability of an official proceeding." Treating statutory terms "essentially as surplusage" is disfavored "in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Ratzlaf*, 510 U.S. at 140-41. The Fifth Circuit asserts that an intent to impede an agency's fact-finding ability somehow "implies a degree of personal culpability beyond a mere intent to make documents unavailable" to that agency, but never explains how. There is simply no space between an intent to deprive the SEC of documents that it is interested in and an intent to impede the SEC's "fact-finding ability"—but even if there were, that would be slicing the onion so finely that it cannot possibly be what Congress intended, especially since "corruptly" carries such powerful connotations. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 29-31 (2001) (rejecting statutory interpretation on surplusage grounds, even though section might still serve an "independent function" in "'rare and egregious' cases," because canon disfavors interpretations rendering sections "'insignificant, if not wholly superfluous'").

Second, 18 U.S.C. § 1515(a)(6) provides that "the term 'corruptly persuades' does not include conduct which would be misleading conduct but for a lack of a state of mind." If "corruptly" means the use of unlawful means or persuasion to break the law, then § 1515(a)(6) makes perfect sense; it clarifies that unintentionally lying to a witness is not a

wrongful means sufficient to make persuasion corrupt. But if the Government's intransitive interpretation is correct and any persuasion is "corrupt" if motivated by a desire to impede an agency's fact-finding ability, § 1515(a)(6) becomes truly bizarre. That section must provide a defense for some defendants whose persuasion would otherwise be corrupt; otherwise it would be a nullity. Under the Government's interpretation, therefore, § 1515(a)(6) would have to provide a defense for someone who accidentally lies to a witness even if their purpose is to impede agency fact-finding. But *telling the truth* to impede agency fact-finding would remain criminal. So a defendant who thinks he is telling the truth to impede an official proceeding has committed a crime if he is right, but not if—entirely unbeknownst to him—he happens to be wrong? That violates the canon against absurd constructions.[31] A transitive reading of "corruptly" avoids this interpretive train wreck entirely.

Third, § 1512(d) creates a misdemeanor punishable by less than a year in prison for "[w]hoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from" testifying at an official proceeding or reporting a crime to law enforcement. It would be surprising for Congress to make "dissuad[ing]" a person from testifying by intentional harassment a mere misdemeanor, but *politely persuading* them not to testify, with no harassment, into a ten-year felony.[32]

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[31] It also makes criminality turn on facts the defendant does not know, contrary to *Morrissette v. United States*, 342 U.S. 246, 270-71 (1952), and creates an arbitrary impossibility defense for a defendant who believes he has done the thing the law forbids (i.e., tell the truth), contrary to *Osborn v. United States*, 385 U.S. 323, 333 (1966).

[32] The felony section technically requires a specific intent to "cause or induce any person to ... withhold testimony ... from an official proceeding," 18 U.S.C. § 1512(b)(2)(A), while the misdemeanor could be read to punish any harassment that *in fact* "dissuades any person from ... attending or testifying in an official proceeding," *id.* § 1512(c). But that is a very slender reed on which to hang nine years in prison. It would be much more reasonable to conclude that Congress intended the felony to cover persuasion that was, in itself, more culpable than mere harassment:

Finally, the instructions in this case rendered the overall scheme of the federal obstruction statutes as they existed in 2001 positively nonsensical. Although it was not a crime for David Duncan to discard documents, and it was not a crime for his secretary to discard documents, it somehow became a felony for David Duncan to hand a document to his secretary and politely ask her to discard it. A distinction like that could be rational only if it turned on something independently wrongful about involving the secretary. The instructions given here make criminality turn on the involvement of a second person, but then strip that fact of any moral relevance to the supposed crime. That is precisely why Congress recognized that the use of the witness tampering statute here rested on a "legal fiction."

"[C]orruptly persuade[s]" in § 1512(b) is "merely one strand of an intricate web of regulations" governing conduct intended to obstruct proceedings. *See Sun-Diamond*, 526 U.S. at 409. The rest of those provisions are carefully cabined by pending proceeding requirements (§§ 1503, 1505), limitations to information that is known to be evidence of a crime (§§ 1511, 1512(b)(3)), or requirements of inherently wrongful means such as murder (§§ 1512(a), 1513(a)). "Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter. Absent a text that clearly requires it," this Court "ought not expand this one piece of the regulatory puzzle so dramatically as to make many other pieces misfits." 526 U.S. at 412.

The Government has consistently argued that the arbitrariness introduced by its interpretation of § 1512 merely reflects a "gap" in the statutory scheme that Congress has since "closed" with Sarbanes-Oxley. Of course that commits the classic error of relying on subsequent legislative history to interpret the product of an earlier Congress. And the fact that Congress felt a need to pass sweeping new statutes demonstrates its understanding that

such as bribing a witness or urging perjury.

Andersen's conduct was not criminal under existing law—and that this was essentially an *ex post facto* prosecution. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).[33] More profoundly, though, it just is not fair or accurate to describe the fact that David Duncan could lawfully discard documents on his own in 2001 as a technical oversight—a "gap" that needed to be "closed." The *Pettibone* rule that even purposeful interference with government fact-finding is not obstruction prior to the onset of a pending proceeding had been the law for a century. Congress had plenty of chances to change it but chose not to, probably because (as this Court recognized in *Aguilar*) the pending proceeding and "nexus" requirements supply much of the *mens rea* for the crime and help confine it to some reasonable bounds. Those requirements are not drafting errors; they reflect a fundamental judgment about the line between criminal conduct and legitimate self-defense under the law.

In the Victim and Witness Protection Act of 1982 ("VWPA"), Pub. L. No. 97-291, 96 Stat. 1248, which added § 1512, Congress recognized that certain forms of conduct directed at potential witnesses are unfair *to the witnesses themselves*, and for that reason ought to be criminal prior to the point at which traditional obstruction law intervenes to protect the fact-finding ability of official proceedings. The Government twisted that statute in this case to prosecute conduct that has nothing to do with witness tampering, and

[33] Those new statutes also may not prove to be as broad as the Government suggests. The new § 1512(c) punishes anyone who "corruptly ... influences ... any official proceeding, or attempts to do so" with 20 years in prison. As Judge Silberman correctly recognized in *North* when interpreting similar language in § 1505, if simply *influencing* a congressional or agency proceeding for the purpose of impeding it is a crime, then "we might as well convert all of Washington's office buildings into prisons." 910 F.2d at 942. The word "corruptly" is plainly insufficient to provide fair warning of criminality in those circumstances, and such an interpretation would be a blatant violation of the First Amendment. Judge Silberman correctly concluded that "corruptly" in § 1505 must require unlawful means or actual consciousness of wrongdoing. The same will prove true of § 1512(c).

thereby created a large and arbitrary hole in the traditional limitations on the crime of obstruction. To then turn around and pretend that those limitations were a puzzling but inconsequential "gap" in the statutory scheme is an audacious sleight of hand.

c. The transitive interpretation of "corruptly" is also much more consistent with the obvious purpose of the statute. Section 1512 is labeled "[t]ampering with a witness, victim, or an informant," and prohibits a variety of wrongful acts directed at potential witnesses with the intent to prevent their testimony or to make evidence unavailable to an official proceeding. It punishes killing or attempting to kill a witness, "us[ing] physical force or the threat of physical force," knowingly intimidating, threatening, misleading, or "corruptly persuad[ing]" a witness, and "intentionally harass[ing]" a witness. The obvious purpose of this statute is to protect victims and witnesses from being intimidated, harassed, or "corrupted"—not to punish defendants whose conduct is wrongful, if at all, only for reasons that have nothing to do with that conduct's effect on a potential witness.

The legislative history confirms what is plain on the face of the statute. The hearings that produced the VWPA were focused on "[t]he problem of victim and witness intimidation." S. Rep. No. 97-532, at 15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2521. As the name suggests, the statute's purpose was "to strengthen existing legal protections for victims and witnesses of Federal crimes." *Id.* at 9. The Senate Judiciary Committee Report stresses in particular that under prior law a "victim or witness has little hope of protection from the government if he is harassed or threatened by the defendant out on bail, or the defendant's friends or family; or if the convicted criminal, after serving his time, decides to retaliate." *Id.* at 10. It goes on to explain that "Section 1512 applies to offenses *against witnesses, victims, or informants* which occur before the witness testifies." *Id.* at 14 (emphasis added).

The witness protection purpose of § 1512 is even more striking because the original version of the VWPA *did* contain a broad obstruction of justice provision that would have criminalized conduct because of the defendant's motive to obstruct rather than because of the conduct's effect on witnesses. *See* S. 2420, 97th Cong., § 1512(a)(3), 128 Cong. Rec. S3856 (daily ed. Apr. 22, 1982). That clause would have applied to "[w]hoever ... does any other act ... with intent to influence improperly, or to obstruct or impair the ... administration of justice." *Id.* But that broad obstruction provision was deleted from the final bill because, as Senator Heinz explained, it was "*beyond the legitimate scope of this witness protection measure.*" 128 Cong. Rec. 26,810 (1982) (emphasis added).

The later addition of "corruptly persuades" to § 1512(b) does not reflect a change in the nature or purpose of the statute. The original VWPA deleted all of the specific references to witnesses from § 1503. The Second Circuit and others concluded that witness tampering could henceforth be prosecuted *only* under § 1512. Since § 1512 criminalized only violence, coercion and deception, non-coercive, non-misleading witness tampering therefore was suddenly no longer a crime at all, even if it involved plainly wrongful acts like urging or even bribing a witness to lie in an already pending proceeding. *See United States v. Hernandez*, 730 F.2d 895, 898-99 (2d Cir. 1984).

In response, Congress amended § 1512 in 1988 to add "or corruptly persuades" to the list of conduct prohibited by § 1512(b). Senator Biden explained that the new language was necessary because, in the Second Circuit, "promising to pay a witness for giving false testimony is not a crime." 134 Cong. Rec. S17,369 (daily ed. Nov. 10, 1988). He emphasized that, while other Circuits allowed prosecutions under § 1503 for "the *corruption of a witness* by some means other than those stated in section 1512," in the Second Circuit "non-coercive *corruption of witnesses* [could not] be prosecuted under any obstruction of justice statute." *Id.* (emphasis added). Senator Biden explained that "corrupt persuasion"

would "include preparing false testimony for [a] witness, or offering a witness money in return for false testimony." *Id.*

Nothing in the legislative history suggests that Congress intended to break from the VWPA's clear purpose of protecting witnesses, or that it intended to enact the omnibus obstruction clause that it had stricken from the original bill.[34] Instead, the language and history of the 1988 amendment suggest that Congress simply intended to protect witnesses from attempts to "corrupt" them as well as from attempts to coerce or intimidate them.

2. Conduct Undertaken With An Honest And Reasonable Belief That It Is Not Wrongful Is Not "Knowingly Corrupt"

Andersen also requested an instruction that conviction for corrupt persuasion requires proof that the defendant knew that his conduct was "wrongful." The district court rejected that instruction, and told the jury that Andersen should be convicted even if it "honestly and sincerely believed that [its] conduct was lawful." R. 1253.

The plain language, "knowingly ... corrupt[]," at the very least requires some consciousness of wrongdoing. The intransitive meaning of "corrupt" is "depraved, evil: perverted into a state of moral weakness or wickedness." *Webster's Third New International Dictionary* 512 (1986). A person who sincerely and reasonably believes that his conduct is not wrongful is not depraved or evil—and he

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[34] The Fifth Circuit relied heavily on a single statement by Senator Biden that "corruptly persuades" was designed to "include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503." Pet. App. 22-23a. But Senator Biden did not say that "corruptly persuades" was designed to duplicate all of the ways that § 1503 might be violated by persuasive conduct; he said its purpose was to ensure the same "protection of witnesses." That supports a transitive reading. And the instructions given in this case in fact make § 1512 into a *radical expansion* of § 1503, by criminalizing conduct that has always been lawful. In addition, every decision mentioned by Senator Biden, whether prosecuted under § 1503 or the pre-amendment § 1512(b), involved independently wrongful efforts to influence witnesses. *See* Pet. 23 n.23.

certainly is not *knowingly depraved or evil*. "Persuasion," even when motivated by a desire to impede official fact-finding, is not so inherently wrongful that such a state of mind could be imputed by law. *Supra* § I(A). And if the usual meaning of "corruptly" in the criminal law is an "'intent to give some advantage inconsistent with official duty and the rights of others,'" *Aguilar*, 515 U.S. at 616 (Scalia, J., concurring in part and dissenting in part) (quoting *Ogle*, 613 F.2d at 238), a person does not act "knowingly ... corruptly" unless, at a minimum, he believes that the advantage he seeks is in fact inconsistent with a public duty. Judge Silberman concluded in *North* that under the ordinary meaning of "corrupt" in § 1505 a jury "must be permitted to consider, at the very least, evidence tending to show that the defendant believed that the nature of his conduct (as opposed to its underlying justification) was appropriate—that is, in accordance with the law." 910 F.2d at 944. Surely the same is true under § 1512(b), which requires conduct that is not just "corrupt" but "knowingly ... corrupt[]." That insight does not violate the traditional rule that ignorance of the law is no excuse; at most it simply recognizes that some general knowledge of law is embedded in the statute's *mens rea*. *Liparota v. United States*, 471 U.S. 419, 425 (1985); *Bryan v. United States*, 524 U.S. 184, 196 (1998) (requiring general consciousness of unlawfulness "does not carve out an exception to the traditional rule that ignorance of the law is no excuse").

In any event, the usual presumption against "ignorance of the law" defenses assumes that criminal statutes are not interpreted so broadly that a person could be convicted in the absence of some fair warning—from the conduct, surrounding context, or plain language of the statute—that the line into criminal behavior was being crossed. When that danger is present, this Court has not hesitated to require subjective knowledge of unlawfulness.

The statute at issue in *Ratzlaf* punished "willfully" structuring currency transactions for the specific "purpose of evading a financial institution's reporting requirement"

with respect to cash transactions over $10,000. 510 U.S. at 136. The Government argued there that the mere "purpose to evade the reporting requirement," and thereby deprive the Government of information that it needed to combat money laundering, was enough to "ensure that the defendant acted with a wrongful purpose" and hence "willfully." *Id.* at 143. But this Court recognized that the Government's interpretation conflated "willfully" with the statute's separate specific intent requirement, and therefore violated the canon against superfluous constructions. It also squarely rejected the argument that an intent to "depriv[e] the Government of the information that [the reporting requirement] is designed to obtain" is sufficient for criminality. *Id.* at 144. This Court therefore interpreted the statute to require knowledge that structuring is unlawful. "[W]e are unpersuaded by the argument that structuring is so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement is satisfied irrespective of the defendant's knowledge of the illegality of structuring." *Id.* at 146. [35]

This case is remarkably similar. The Government again claims here that facially innocent conduct is criminal because of the defendant's "bad purpose." It argues that a purpose to impede the Government's fact-gathering ability is inherently bad or improper. It again denies that a criminal "bad purpose" requires any consciousness of wrongdoing. And it again ignores that its interpretation of the required "bad purpose" duplicates a specific intent requirement found elsewhere in the statute. It does not matter that § 1512(b) uses the *mens rea* term "corruptly" rather than "willfully."

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[35] In *Bryan*, this Court interpreted a statute criminalizing "willfully" dealing in firearms without a federal license. This Court again stated that "a 'willful' act is one undertaken with a 'bad purpose,'" and concluded that "'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'" 524 U.S. at 191-92 (quoting *Ratzlaf*, 510 U.S. at 137). This Court rejected the defendant's argument that specific knowledge of the federal licensing requirement was required; it was enough if "the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *Id.* at 193.

In *Ratzlaf*, the Court required proof of the defendant's specific knowledge of the structuring law (not merely general consciousness of wrongdoing as argued here), and it did so based on fair warning principles, the canon against superfluous constructions, and the rule of lenity. This Court acknowledged that "'willful' ... is a 'word of many meanings,' and 'its construction [is] often ... influenced by its context.'" 510 U.S. at 141 (citation omitted) (alterations in original). "Corruptly" is just as flexible and, if anything, conveys greater consciousness of wrongdoing than "willfully" does. And this Court has even held that statutes that do not use the term "willfully" can require specific knowledge of the law. *See, e.g., Liparota*, 471 U.S. at 426 ("knowingly").

C. The Fifth Circuit's Interpretation Of "Corruptly" Violates The Rule Of Lenity And The Doctrine Of Constitutional Doubt

Andersen respectfully submits that the conclusions above are the best reading of the plain language of § 1512(b), in light of its structure, purpose, and place in the statutory scheme. But if those conventional interpretive tools leave any doubt, it must be resolved in Andersen's favor.

1. The Obvious Ambiguity Of "Corruptly Persuades" Must Be Resolved By Lenity

The rule of lenity requires that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987). That rule "is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). As the brief for the Washington Legal Foundation and Chamber of Commerce of the United States as *Amici Curiae* points out, that rule also minimizes disruptive conflicts over the interpretation of criminal statutes.

The phrase "corruptly persuades" in § 1512(b) is, at a

minimum, ambiguous. *See Farrell*, 126 F.3d at 487 ("Without any definitional assistance, we find the phrase 'corruptly persuades' to be ambiguous."); *Poindexter*, 951 F.2d at 378 ("[O]n its face, the word 'corruptly' is vague ...."). Even the Fifth Circuit conceded that "corruptly persuades" is ambiguous, and that the court's "improper purpose" gloss casts only a "dim light ... upon its meaning, its circularity aside." Pet. App. 19a. And even if "corruptly" unambiguously meant an "improper purpose," it *certainly* does not unambiguously mean a purpose "to impede the fact-finding ability of an official proceeding." That would be a remarkable expansion of prior law. *Supra* § I(A). A transitive reading of "knowingly ... corrupt[] persuasion[]" and a basic consciousness of wrongdoing requirement are at least as rational as the interpretation adopted below. The rule of lenity therefore requires them.

2. The Instructions In This Case Criminalize Innocent Conduct Without Fair Warning

The first essential of due process of law is that no one can be punished without "fair warning ... in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617 (1954). If an otherwise vague statute "can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." *Id.* at 618.

For more than a century, it was clearly settled law that discarding documents prior to the onset of official proceedings is not obstruction of justice. The instructions here reversed that result, and also criminalized a great deal of persuasive conduct that a reasonable person would not have understood to be wrongful. *Supra* § I(A). To Andersen's knowledge no one has *ever* been prosecuted for requesting edits to a draft memo. Yet commentators

believe that is exactly what the jury had in mind when it returned its verdict.[36] The Government explicitly argued in its post-trial briefing that Nancy Temple's proposed edits to a draft memorandum were sufficient to support conviction *standing alone*, that that conduct "figured prominently in the trial and in the government's jury addresses" and that it was "thoroughly developed at trial through several witnesses." JA 215. The United States proudly asserted that "[d]uring the summations of the government, Temple's creation of the misleading memorandum was explicitly and repeatedly addressed and argued, among other proof of Andersen's guilt," and that "the jury was explicitly asked to pay particular attention to [Temple's edits] as 'devastating proof'" of criminality. JA 216 & n.6.

The spare phrase "knowingly ... corruptly persuades," buried in a "witness tampering" statute that otherwise criminalizes only violent, coercive or deceptive conduct, is clearly insufficient to give Andersen notice that such a radical change in the law had occurred. If there is any doubt on that point, it is supplied by the public reaction to this prosecution. As the briefs of various *amici* make clear, this case was a great shock to corporate America and to the practicing bar. And the legislative history of Sarbanes-Oxley recognizes both that this prosecution was based on a "legal fiction," *supra* at 22 and accompanying text, and that additional legislation was necessary to ensure that conduct like Andersen's would be criminal.[37] The new §§ 1519 and 1520 cannot be smuggled into § 1512 and applied *ex post* to convict Andersen for conduct lawful at the time.

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[36] *See* Hill, *supra* n.23, at 1552-53; *see also* Brief for the NACDL as *Amicus Curiae*, at 5-7; Stephen Gillers, *The Flaw in the Andersen Verdict*, N.Y. Times, June 18, 2002, at A23.

[37] *See, e.g.*, 148 Cong. Rec. S7419 (daily ed. July 26, 2002) ("Had such clear requirements and policies been established at the time Andersen was considering what to do with its audit documents, countless documents might have been saved from the shredder."); S. Rep. No. 107-146, at 7 (2002) ("[T]he current laws regarding destruction of evidence are full of ambiguities and limitations that must be corrected.").

3. The Fifth Circuit's Interpretation Of "Corruptly Persuades" Raises Grave Concerns Under The First Amendment

The Government's expansive interpretation of § 1512(b) raises "grave and doubtful constitutional questions" of both overbreadth and vagueness under the First Amendment.[38]

Advocacy intended to affect the outcome of a proceeding is protected by the First Amendment. *See, e.g., Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911-15 (1982). Interpreting "corruptly" to require only an "improper purpose," or a purpose to impair the fact-finding ability of a government proceeding, does not save the statute. Just as "evidence of anticompetitive intent or purpose alone cannot transform" protected speech into an antitrust violation, *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993), communication intended to persuade someone to do something legal does not lose First Amendment protection because the speaker's purpose is to influence or impede an investigation. This Court has not hesitated to reverse convictions for contempt by publication, even though the publishers plainly intended to affect the outcome of a judicial proceeding. *See, e.g., Craig v. Harney*, 331 U.S. 367, 369-70, 374-75 (1947); *Bridges v. California*, 314 U.S. 252, 271-78 (1941). And, as the D.C. Circuit observed in *North*, attempting to persuade a member of Congress not to pursue an investigation is protected by the Constitution and is not corrupt even though it plainly involves "endeavoring to impede or obstruct the investigation." 910 F.2d at 882.

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[38] *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909). By arguing that the statute failed to give fair warning, Andersen raised the doctrine of constitutional doubt below. Although Andersen did not raise First Amendment arguments below, they are merely another reason to apply the doctrine of constitutional doubt. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Yee v. Escondido*, 503 U.S. 519, 534 (1992).

The Fifth Circuit's interpretation would criminalize a broad range of protected speech, including core political speech.[39] "[C]orruptly" must be narrowly confined to the use of unlawful means, such as bribery, or unlawful ends, such as urging another person to violate the law. This Court has drawn a similar line between protected communications and activities that may give rise to liability in other areas.[40]

Defining "corruptly" to mean "improper purpose" also fails to "furnish a sufficiently ascertainable standard of guilt." *Herndon v. Lowry*, 301 U.S. 242, 261 (1937). "Improper" can mean, among other things, "[n]ot suited to circumstances or needs," "unsuitable," "indecorous" or "incorrect." *American Heritage Dictionary* 648 (2d ed. 1982). Like the Fifth Circuit, Pet. App. 19a, the district court apparently agreed that "improper purpose" is too vague and provided an additional gloss "for this case." But a crime defined by terms that are so indefinite that courts must change their meaning on a case-by-case basis is void for vagueness. *See Ashton v. Kentucky*, 384 U.S. 195, 198-99

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[39] *E.g., supra* § I(A). These concerns constitute a proper basis for reversal. *See Clark v. Suarez Martinez*, 125 S. Ct. 716, 724 (2005) (invoking constitutional doubt "whether or not those constitutional problems pertain to the particular litigant before the Court"); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980) ("[A] litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.").

[40] For example, provisions of the National Labor Relations Act ("NLRA") intended to prevent neutral third parties from becoming involved in labor disputes only prohibit communications that involve improper means or illegal ends. In order to avoid a serious First Amendment question, this Court concluded that peaceful distribution of handbills intended to persuade consumers to boycott a secondary employer's business did not violate the NLRA. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 578-79 (1988). But the Constitution protects neither a union's use of improper means, such as coercion to induce a secondary boycott, *see Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 226 (1982); *NLRB v. Retail Store Employees Union*, 447 U.S. 607, 616 (1980), nor its efforts to encourage illegal activity such as a secondary strike, *see Int'l Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694, 705 (1951).

(1966) ("[S]ince the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it ... leaves to the executive and judicial branches too wide a discretion in its application.") (internal quotation marks and citations omitted); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[W]e cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights.").

II. THE JURY WAS IMPROPERLY INSTRUCTED ON THE REQUISITE NEXUS TO AN OFFICIAL PROCEEDING

Even if the jury was properly instructed on the term "corruptly persuades," reversal is still required. Although § 1512 deliberately relaxes the traditional pending proceeding requirement to protect witnesses, the section still must be interpreted to require proof of some meaningful "nexus" to some particular official proceeding. Otherwise the distinction between impeding an actual "official proceeding" and impeding *possible* proceedings or mere law enforcement investigations simply collapses. *Aguilar*, 515 U.S. at 601-02. The district court nevertheless instructed the jury that an "official proceeding" includes "all the steps and stages in the agency's performance of its government functions, and it extends to administrative as well as investigative functions, both formal and informal," and that it was enough if "Andersen acted corruptly and with the intent to withhold an object or impair an object's availability for use in an official proceeding, ... whether or not that proceeding had begun or whether or not a subpoena had been served." R. 1253. Those instructions stripped § 1512(b) of any "nexus" requirement at all, and contaminate the jury's specific intent finding as well.

A. The Jury Instructions Failed To Require Proof Of Any Meaningful Nexus To An Official Proceeding

Andersen sought to require proof of a genuine nexus between its conduct and some real "official proceeding" in several ways. Because the Fifth Circuit appeared to hold in *Shively*, 927 F.2d at 812-13, that a defendant could not be

convicted under § 1512(b) without proof of "intent to affect ... some particular federal proceeding that is ongoing or is scheduled to be commenced in the future," Andersen requested an instruction phrased in those terms. *See United States v. Frankhauser*, 80 F.3d 641, 652 (1st Cir. 1996) (characterizing the quoted language as the holding).[41] The Fifth Circuit concluded in this case, however, that this language in *Shively* was dicta.

The Fifth Circuit instead held that any nexus required by the statute was satisfied because it was clear "[t]hat the SEC was the feared opponent and initiator of a proceeding, and not some other shadowy opponent." Pet. App. 28a. But that reading does little to confine the breadth of the statute. Businesses in regulated industries will often be able to predict which agency might investigate them. Under the Fifth Circuit's reasoning, the "fear[]" of a possible proceeding would seemingly be sufficient to criminalize virtually any effort to influence or impede the flow of information to the Government. Even though the proceeding need not be "pending or about to be instituted at the time of the offense," 18 U.S.C. § 1512(e)(i), this Court should at the very least require proof that the defendant believed that some particular proceeding was likely to occur in the near future.

That interpretation is required by the language of the section, which draws a line of demarcation between the intent to withhold information from "an official proceeding" and an intent to "prevent the communication ... of information" to a "law enforcement officer." 18 U.S.C. §§ 1512(b)(1), (3). It is also required by this Court's reasoning in *Aguilar*. This Court held in *Aguilar* that, even when a judicial proceeding was pending, it was "far [too] speculative" to conclude that deliberate deception of two FBI agents would have the "natural and probable effect" of

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[41] When the district court rejected that instruction, Andersen proposed other alternatives designed to require some proof of nexus. *See* R. 1122-23 ("particular proceeding"); (a proceeding "relating to Enron").

obstructing justice absent proof that Judge Aguilar knew it was "likely" or "probable" that those agents would actually testify before the grand jury. 515 U.S. at 601. His belief that they "might or might not" testify (and of course he knew they often do), was insufficient to satisfy the "nexus" requirement implied by the statute. *Id.* at 602. By analogy, Section 1512 should at least require proof that a defendant charged with "corruptly persuad[ing]" a witness believed that an official proceeding was "probable."[42] Absent such proof, Andersen was in Judge Aguilar's shoes: it did not know that its conduct would have the "probable" effect of obstructing that proceeding.

Finally, the rule of lenity and fair warning principles require that any ambiguity concerning the nexus issue must be resolved in Andersen's favor. Section 1503 is not unconstitutionally vague primarily because the pending proceeding and nexus requirements narrow its application. But § 1512 applies to agency and congressional proceedings—a context in which interference is much less clearly wrongful, *see, e.g., North*, 910 F.2d at 882—and relaxes the pending proceeding requirement. Without a meaningful nexus requirement it would present grave constitutional problems, particularly if, as in this case, "corruptly" is not given a strong independent meaning.

B. The Jury Was Improperly Instructed That An Official Proceeding Was Already Pending

The district court greatly magnified that error by affirmatively instructing the jury that the informal SEC inquiry into Enron that was pending during the relevant

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[42] Andersen did not propose that precise formulation, although it did cite *Aguilar* to the district court. JA 197. Regardless, a defendant who clearly explains why an instruction is incorrect need not guess precisely what instruction an appellate court will ultimately adopt. *See United States v. Jones*, 909 F.2d 533 (D.C. Cir. 1990); *see also* 2A Charles Alan Wright, *Federal Practice and Procedure* § 487 (3d ed. 2000) ("It is a grave error to submit a case to a jury without accurately defining the offense charged and its elements. Such an error is not excused or waived by failure to request a proper instruction.").

time period was itself an "official proceeding." That conclusion is inconsistent with settled law, the language and structure of § 1512, and the SEC's own regulations. It effectively removed the nexus issue from the jury, and also contaminates the jury's finding that Andersen specifically intended to impede the fact-finding ability of an "official proceeding."

A distinction between judicial proceedings and mere police investigations has always been central to the law of obstruction. "Official proceeding" for § 1512 is defined as:

> (A) a proceeding before a judge or court of the United States, ...; (B) a proceeding before the Congress; (C) a proceeding before a Federal Government agency which is authorized by law; or (D) a proceeding ... before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person ....

18 U.S.C. § 1515(a)(1). That definition is plainly designed to preserve the traditional distinction. Subsection (A) includes proceedings "before a judge or court" but pointedly *not* law enforcement investigations. As a matter of plain language a "proceeding *before* a Federal Government agency" must mean a formal proceeding empowered to hear testimony and act, and "authorized by law" indicates that the agency must take some official action first. Congress knows how to criminalize interference with any "matter within the jurisdiction" of a federal agency when it wants to. *See* 18 U.S.C. §§ 1519, 1001(a).

The language of § 1512 further confirms that Congress intended to preserve the traditional distinction. Section 1512 is rife with references to "witness[es]," "testimony," subpoenas, admissibility, and similar language associated with formal proceedings. And § 1512(a), (b), and (c) all criminalize conduct intended to interfere with the flow of information to an "official proceeding" without regard to what that information is, but then separately provide that interfering with the communication of information to a "law enforcement officer" is criminal only if it relates, *inter alia*,

to "the commission or possible commission of a Federal offense." Congress surely did not intend to give the informal inquiries of junior agency staffers greater protection from interference than it gave to FBI agents enforcing the criminal law.

The SEC's own regulations define a "proceeding" as "any agency process initiated ... [b]y an order instituting proceedings." 17 C.F.R. § 201.101(a)(9). An "order instituting proceedings" means "an order issued by the Commission commencing a proceeding or an order issued by the Commission to hold a hearing." *Id.* § 201.101(a)(7). Such an order gives specifically identified members of the SEC staff the authority, which they would not otherwise have, to subpoena witnesses and administer oaths. *See* 15 U.S.C. §§ 77t(a), 77s(c), 78u(a)(1) & (b), 80a-41(b), 80b-9(a) & (b). Prior to that point an informal investigation by agency staff is limited to voluntary requests for the production of documents and the cooperation of witnesses. *See* 17 C.F.R. § 202.5. It is also called a "matter under inquiry," which clearly evokes the distinction between "matters" and "proceedings" used throughout the Code. *Compare* 18 U.S.C. § 1505 *with id.* §§ 1001, 1519.

Reviewing courts have consistently held that the line between a simple staff investigation and a true proceeding "before" a federal agency turns on the power to subpoena documents and compel testimony. The leading case on what constitutes a "proceeding" of the SEC under § 1505 held that it encompasses "any investigation directed by a formal order of the Commission, at which a designated officer takes testimony under oath." *United States v. Batten*, 226 F. Supp. 492, 494 (D.D.C. 1964), *cert. denied*, 380 U.S. 912 (1965). The power to compel testimony distinguished such hearings from the "mere police investigation[s]" that have never been covered by the obstruction laws. *Id.* That rule has been consistently followed under § 1505 for proceedings of the SEC and other agencies. *See United States v. Senffner*, 280 F.3d 755, 761 (7th Cir.), *cert. denied*, 536 U.S. 934 (2002); *United States v. Kelley*, 36 F.3d 1118, 1127 (D.C.

Cir. 1994). The statutory definition in § 1512 requires it even more clearly. And, again, any remaining doubt on that point must be resolved by lenity and fair warning principles.

III. THE INSTRUCTIONAL ERRORS IN THIS CASE REQUIRE REVERSAL

A. Andersen Is Entitled To An Acquittal Under Any Proper Definition Of "Corruptly"

The Fifth Circuit's limited harmless error analysis assumed that the instructions as given correctly defined the elements of the crime. The Government has never disputed, however, that reversal is required if the instructions defined the offense incorrectly. Instructional errors involving either "misdescriptions," "omissions," or conclusive presumptions about an element of a criminal offense implicate constitutional rights, and require reversal unless they are harmless beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 10 (1999); *see also O'Neal v. McAninch*, 513 U.S. 432, 435, 442 (1995) ("possible jury 'confusion' arising out of a trial court instruction about the state of mind necessary for conviction" is "an error of constitutional dimension"). Under any defensible interpretation of the phrase "knowingly ... corruptly persuades," Andersen is entitled to acquittal as a matter of law.

If the correct reading of "corruptly" is transitive, there is simply *no* evidence that anyone at Andersen used unlawful means of persuasion or otherwise "corrupted" another person by persuading them to commit a crime. *Supra* at 5-6. The Government *never argued otherwise*, and thus has waived any argument that Andersen is not entitled to acquittal as a matter of law under the transitive meaning. *See* Brief for the United States at 73-92 (5th Cir. May 27, 2003).[43] In addition, "knowingly ... corrupt[]" persuasion

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[43] The Fifth Circuit nevertheless included a confusing reference to possible harmless error by stating that "[o]n the facts of this case, that the jury was not required to find a violation of an independent legal duty did not have a substantial and injurious effect on the verdict." Pet. App. 24-25a. But the court did not suggest that there was evidence (let alone overwhelming evidence) that an Andersen employee persuaded a

requires consciousness of wrongdoing. There is no evidence from which a reasonable jury could conclude beyond a reasonable doubt that any of the alleged "corrupt persuaders" believed that their conduct was wrongful. To the contrary, the Government's own cooperating witness repeatedly told the jury that he believed that his conduct was "entirely appropriate." JA 159. Indeed, it is irrational to conclude that Andersen supervisors would have openly influenced dozens of employees to comply with the policy if they had understood it to be wrongful or unlawful. There was *no* surreptitious behavior of the type that might have permitted a jury to infer consciousness of wrongdoing in the absence of direct evidence. *See, e.g., Bryan*, 524 U.S. at 189.

Finally, if this Court were to conclude that the meaning of "corruptly" should be left to the jury or given an unadorned dictionary meaning like "depraved," "evil," or "wicked," then Andersen is at the least entitled to a new trial. The district court's "intent to impede the fact-finding ability of an official proceeding" gloss improperly instructed the jury that it had to presume Andersen's conduct "corrupt" if it found certain predicate facts. *See Neder*, 527 U.S. at 10. That error could not be harmless on this record.

B. The Incorrect Nexus And Official Proceeding Instructions Independently Require Reversal

Even if the jury was properly instructed on the definition of "corruptly," the errors in the nexus and official proceeding instructions would independently require acquittal, or at a minimum, a new trial.

The Fifth Circuit acknowledged that "without some limiting sights" on the nexus issue this statute criminalizes maintaining *any* document retention policy. Pet. App. 27a. For the same reason it also criminalizes legal advice, like Nancy Temple's, suggesting edits to a draft document. The Fifth Circuit concluded, however, that "[w]herever the permissible reach of this statute may finally be drawn, it is

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colleague to violate the law. Instead it just repeated that the instructions were correct and did not render "corruptly" superfluous. *Id.*

beyond this case" because "[t]his case was tried on the theory that Andersen intended to undermine, subvert, or impede a proceeding of the SEC"; because "[t]he government did not suggest that a records retention program violated the Act"; and because the fact "[t]hat the SEC was the feared opponent ... was clear at every step." *Id.* at 27-28a. The court then quoted from the prosecution's opening statement to show "how the case was tried." *Id.*

The court's assertion that the Government never argued that mere maintenance of a records retention program violates § 1512 is incorrect. It did, repeatedly. Indeed, the prosecutors argued in closing statements that a brief overview of Andersen's retention policy, given at a training meeting at which 89% of the attendees were not working on the Enron engagement, was culpable "corrupt[] persua[sion]." Tr. 6432-33. The jury asked to see that videotape during their deliberations, Pet. App. 27a, and was permitted to do so. Tr. 6834

The Fifth Circuit's analysis also confuses Andersen's awareness that an "official proceeding," if it were to occur, would be conducted by the SEC with awareness that an SEC investigation was in fact scheduled, particular, likely, probable—or whatever other formulation appropriately captures the requirement that a mere awareness of possible future proceedings is not sufficient for criminality. Quoting the prosecution's *allegation* in its opening statement that Andersen "knew that the SEC was coming," Pet. App. 28a, does not make it so, and does not qualify as any coherent form of harmless error analysis.

The court's failure to require any kind of nexus instruction is not harmless. The evidence showed that Andersen did not believe an income restatement (and thus a formal SEC investigation involving Andersen) was probable until *after* all of the alleged acts of corrupt persuasion occurred. *Supra* at 6-12. Indeed, the Government could not even get its own cooperating witness, David Duncan, to testify that he believed that an SEC proceeding was "probable" at the time of his supposedly criminal acts. The

most Duncan could say was that he believed there was a "possibility" that the SEC "might" want to see Andersen documents in the future. *See supra* n.17. As in *Aguilar*, a jury simply could not conclud[e] beyond a reasonable doubt that Duncan had the requisit[e] knowledge to commit the offense and thus Andersen should be acquitted.[44]

If there were any doubt concerning the need for reversal, however, it is dispelled by the court's erroneous definition of "official proceeding," which wrongly instructed the jury that an official proceeding was ongoing throughout the relevant time period. Having obtained the incorrect instruction, the Government played it to the hilt—beginning its closing by telling the jury that "an official proceeding includes both an informal and formal inquiry of the SEC" and that there was no dispute "that there was an SEC proceeding ongoing at the time the document destruction occurred." Tr. 6352; *see also* Tr. 6419. Against that backdrop there is no way to know whether the jury concluded that Andersen intended to "impede the fact-finding ability" of an actual "official proceeding," or merely of the informal investigation that was already ongoing. That error entirely removed the nexus issue, and the specific intent issue as well, from the jury. It cannot possibly be harmless beyond a reasonable doubt.

CONCLUSION

The conviction must be reversed, and remanded with instructions to enter a judgment of acquittal or, at the very least, to grant a new trial.

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[44] Even if a properly instructed jury could find at a new trial that Nancy Temple believed that an SEC proceeding involving Andersen was "probable," there is no basis for a retrial because the jury could not find that Temple had a "corrupt" purpose. Whatever interpretation of "corruptly" this Court adopts, it cannot permit the punishment of "lawful, bona fide, legal representation services." 18 U.S.C. § 1515(c). Permitting conviction on the basis of Temple's legal services would do just that. Because there is insufficient evidence to establish that the conduct of one of the "corrupt persuaders" satisfies all of the elements of the crime, when properly defined, Andersen must be acquitted. R. 6343-44.

Respectfully submitted,

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In the Supreme Court of the United States

ARTHUR ANDERSEN LLP, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner is entitled to relief from its conviction for corruptly persuading its employees with the intent to cause them to withhold documents from, or alter documents for, an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B), on the theory that:

(a) the jury was incorrectly instructed that the term "corruptly" means "having an improper purpose" "to subvert, undermine, or impede the fact-finding ability of an official proceeding"; and

(b) the jury was not instructed that Section 1512(b) requires proof that petitioner believed that some particular "official proceeding" was likely to occur in the near future, and was incorrectly instructed that an "official proceeding" includes an informal investigation by the Securities and Exchange Commission.

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STATEMENT

This case arises from the response of petitioner, then one of the world's "Big Five" auditing firms, to anticipated and actual government investigations into the accounting practices of its client, Enron Corporation. In order to limit scrutiny by the Securities and Exchange Commission (SEC) of petitioner's conduct in connection with Enron's improper accounting practices, petitioner instructed its employees to undertake an unprecedented campaign of document destruction. Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of corruptly persuading persons with the intent to cause them to withhold documents from, or alter documents for, an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B).[1] The court of appeals affirmed. Pet. App. 1a-34a.

1. Enron was one of the nation's largest companies and one of petitioner's largest clients. Petitioner's "Enron engagement team" consisted of more than 100 accountants, and petitioner billed Enron approximately $58 million in the year 2000. Enron employed highly aggressive accounting practices, and petitioner treated Enron as a "high-risk" client. Petitioner nevertheless had an unusually close relationship with Enron. David Duncan, the Andersen partner who led the Enron engagement team, was known as a strong "client advocate," and petitioner bent over backward to accommodate Enron. Pet. App. 3a; Tr. 796-804, 819-823, 940-942, 1173, 1687, 1739-1742, 1847-1848, 3270, 5357, 5529-5532, 5536-5547; GX 304A.

On August 14, 2001, Enron chief executive officer Jeffrey Skilling unexpectedly resigned, leading to widespread speculation about financial problems at Enron and further

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[1] In 2002, Congress amended 18 U.S.C. 1512(b) in respects not relevant to this litigation. All references to Section 1512(b) in this brief are to the 2000 version.

depressing the already declining value of Enron's stock. Within days of Skilling's resignation, Sherron Watkins, a senior Enron accountant who had previously worked for petitioner, warned Kenneth Lay, Enron's newly reappointed CEO, that Enron could "implode in a wave of accounting scandals." Watkins simultaneously conveyed her warnings to petitioner, and they were discussed by Duncan, in-house counsel, and senior management. On August 28, an article in the *Wall Street Journal* suggested improprieties at Enron, and the SEC opened an informal investigation. Pet. App. 4a; Tr. 655-664, 1807-1817, 2804; GXs 821A, 828B.

In September 2001, high-level Andersen personnel learned of serious accounting problems at Enron and began to anticipate an SEC investigation and civil litigation. Specifically, they discovered that the Enron engagement team had approved the use of an improper accounting technique for four "Raptors," special-purpose entities that Enron had used to engage in "off-balance-sheet" activities. To conceal the fact that some of the Raptors had suffered severe losses, the Enron engagement team had allowed Enron to aggregate the four Raptors for accounting purposes. Petitioner's own accounting experts had deemed that technique a "black-and-white" violation of GAAP. While examining that issue, moreover, high-level Andersen personnel learned that Enron and petitioner had made a separate $1.2 billion accounting error in Enron's favor, which would require, at a minimum, that Enron reduce its outstanding shareholder equity by that amount in an upcoming SEC filing. Pet. App. 3a-4a, 6a; Tr. 942-952, 970-971, 1773-1781, 1833-1840, 5413-5414, 5572, 5578.

Petitioner had particular reason to be concerned about the prospect of an SEC investigation. In June 2001, petitioner had agreed to pay a record $7 million fine to settle an SEC action arising from its audit work for Waste Management, Inc. As part of that settlement, the SEC censured petitioner, and petitioner was enjoined from committing any fu-

ture violations of the securities laws. As a result, petitioner was effectively on probation with the SEC. See 17 C.F.R. 201.102(e)(1)(ii) and (iv) (allowing SEC to disbar accountants for "repeated instances of unreasonable conduct"). In July, the SEC had filed an amended complaint against, among others, the lead Andersen partner on an audit for Sunbeam Corporation, contending that Sunbeam's financial statements were materially false or misleading. In connection with that complaint (as it had in the Waste Management investigation), the SEC had issued a formal subpoena to petitioner for records relating to the audit. In light of the Waste Management and Sunbeam investigations, petitioner was anxious to avoid any further sanction or censure. J.A. 93; Pet. App. 4a, 11a-12a; Tr. 448-484, 1764-1765; GXs 621A, 626A, 1026A, 3036, NT Undated.

In late September 2001, petitioner began to prepare for Enron-related legal action, including SEC document requests. By that time, Duncan had already concluded that the SEC might issue such requests. Petitioner assembled an Enron crisis-response group, composed of high-level partners and in-house counsel. By September 28, the group was convening almost daily. On October 8, petitioner retained the law firm of Davis Polk & Wardwell to represent it in any Enron-related litigation. J.A. 161-162; Pet. App. 4a; Tr. 4182-4183, 4519-4522.

Nancy Temple was an Andersen in-house lawyer with responsibility for Enron-related matters. On October 9, Temple discussed Enron with other in-house counsel. In her notes from the meeting, Temple acknowledged that "some SEC investigation" was "highly probable"; that, even if petitioner's accounting experts were able to develop an alternative methodology for the Raptors, there was a "reasonable possibility [that the Raptors issue] will force a restatement" of Enron's previously filed financial statements; and that, absent an alternative methodology, there would be a "restatement and probability of charge of violating [the injunc-

tion] in Waste Management." On October 12, Temple entered the Enron matter in the computer system that petitioner used to track its open legal matters. In doing so, she designated the matter as a "government/regulatory investigation." J.A. 93, 125-132; Pet. App. 5a.[2]

Concerned about the record that the SEC and other litigants would uncover, petitioner decided to purge material from its files under the guise of enforcing its document retention policy. That policy required petitioner to maintain a single central engagement file of its working papers, which contained "only that information which [was] relevant to *supporting* [petitioner's] work." J.A. 45 (emphasis added). All other paper and electronic documents (including drafts, handwritten notes, and e-mails) were to be destroyed when they were "no longer useful to the engagement." J.A. 45, 47, 58. The policy, however, provided that, "in cases of threatened litigation, no related information will be destroyed." J.A. 44. The policy further specified that "related information should not be destroyed" (J.A. 65) whenever, in the

[2] Petitioner believed that an SEC request for its documents would be "likely" even if the SEC did not ultimately conclude that Enron would have to restate its *earnings* (or income). Temple knew, from studying the Waste Management and Sunbeam matters, that the SEC might request documents from petitioner before a restatement was filed. And although Andersen partner John Riley claimed to have believed that the SEC would subpoena petitioner's records only if Enron restated its earnings, and not its assets (or balance sheet), that claim was substantially impeached by his testimony during the Sunbeam matter, in which he acknowledged knowing from the first sign of adverse publicity that petitioner was going to have a problem with an SEC investigation. Riley also acknowledged that he was unaware of critical facts bearing on the likelihood of an SEC proceeding relating to Enron. Finally, there is no evidence that Temple, Duncan, or the SEC shared Riley's view. In fact, an SEC official testified that *any* restatement by a large public company would result in a formal SEC investigation "almost without fail," and another SEC official testified that the SEC intended to seek information from petitioner even before any restatement occurred. Tr. 424, 448-459, 783-784, 5888, 6008-6009, 6093-6096, 6120, 6198; GX NT Undated, at A-004609.

words of a separate policy incorporated by reference, "professional practice litigation against [petitioner] or any of its personnel has been commenced, has been threatened or is judged likely to occur, or when governmental or professional investigations that may have involved [petitioner] or any of its personnel have been commenced or are judged likely." J.A. 29-30.[3] Many Andersen employees were unaware of the details of the document policy. Actual compliance with the policy was spotty, and the Enron engagement team was notoriously lax in that respect. Tr. 1201, 1625-1626, 1883, 1895, 2790-2793, 3331-3338, 4830, 4867-4873, 5294-5295.

Notwithstanding the facts that (1) petitioner had retained outside counsel; (2) Temple had concluded that "some SEC investigation" was "highly probable"; (3) Temple had designated the Enron matter as a "government/regulatory investigation"; and (4) petitioner's work for Enron was ongoing, Temple and others embarked on a campaign to encourage Andersen employees to destroy Enron-related documents, under the guise of complying with the document policy. On October 10, Michael Odom, practice director for petitioner's Houston office, urged an audience of Andersen personnel (including members of the Enron engagement team) to comply with the policy. Odom explained that, "if [a document is] destroyed in the course of the normal policy and litigation is filed the next day, that's great. * * * [W]e've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable." Odom later admitted that his remarks were prompted by a conference call with the Enron crisis-response group. Shortly before

[3] In an official memo explaining the document policy, circulated to all Andersen personnel, petitioner stated that, "if there is a current expectation that * * * access [to the working papers] will be sought [by an external source]," and "if working papers are still in the process of being assembled," then "all extraneous materials should be preserved." GX 1023M. At all relevant times, the Enron working papers had not yet been assembled. Tr. 1881-1882, 3335.

the meeting, Odom himself deleted an unusual volume of electronic documents. For her part, Temple e-mailed Odom on October 12—after she had learned that the Enron engagement team had not been following the document policy, and just minutes after designating the Enron matter as a "government/regulatory investigation." In the e-mail, which Odom forwarded to Duncan, Temple suggested that Odom "remind[] the engagement team of our documentation and retention policy," and added that compliance "will be helpful." J.A. 94, 156-157; Pet. App. 5a; Tr. 1881-1883, 3335, 4175-4176, 6252; GXs 1010A-1010D.

In the days that followed, Enron's predicament worsened. On October 16, Enron issued a press release announcing that it was taking a $1.01 billion charge to its current earnings.[4] In a conference call with analysts later that day, Lay announced that Enron was also reducing its outstanding shareholder equity by approximately $1.2 billion. Those announcements triggered another wave of negative publicity. On October 17, the SEC notified Enron by letter of its investigation and requested certain information and documents. The SEC separately told Enron that its investigation was a "high-priority matter" and "very serious." On October 19, Enron forwarded a copy of the SEC's letter to petitioner. J.A. 103-119; Pet. App. 5a-6a; Tr. 680, 1841-1846, 1850-1852; GXs 1016A-1016B, 1019C-1019D.

In the wake of the SEC letter, Temple and others redoubled their efforts to purge Enron-related material from petitioner's files. On October 19, Temple sent an e-mail attaching the policy to a member of petitioner's internal team of

[4] In the press release, Enron characterized the charge to earnings as "non-recurring," even though petitioner had informed Enron that it believed that the term was misleading. When Enron refused to alter the press release, Temple requested that an internal Andersen memo regarding the press release be revised to delete any reference to petitioner's belief that the press release was "misleading." J.A. 95-102, 149-150; Pet. App. 5a-6a; Tr. 967-968, 1795-1807, 5591-5592.

accounting experts, thereby causing team members to delete hundreds of Enron-related e-mails. On the morning of Saturday, October 20, the Enron crisis-response group convened by telephone to discuss the SEC letter. During that conference call, Temple twice instructed the members of the group to "[m]ake sure to follow the [document] policy." Pet. App. 6a; Tr. 978-985, 1622-1644, 1853-1862; GXs 1019A, 3004A.

On October 23, in a conference call with analysts, Enron CEO Lay declined to answer certain questions because of "potential lawsuits, as well as the SEC inquiry." By that date, Duncan had concluded that the $1.2 billion error would require a restatement. After the October 23 conference call, Duncan met with other partners on the Enron engagement team and explained that they should ensure that team members were in compliance with the document policy. Duncan took that step in light of "[t]he continued escalating events surrounding Enron," including "the filing of lawsuits and the SEC inquiry." Duncan then called an "URGENT" and "mandatory" meeting for all members of the Enron engagement team, in which he distributed copies of the document policy and ordered compliance with it. As Duncan later acknowledged, "certainly the threat of potential civil litigation or SEC questions * * * were *[sic]* on our mind." Partners then fanned out and held smaller meetings with their supervisees, discussing the SEC investigation and confirming the need for compliance with the policy. Members of the Enron engagement team were instructed to make document destruction a priority, despite the mounting pressure they faced in dealing with Enron's underlying accounting problems. One Andersen partner told a manager that it was important to clean up the files because "we may be subpoenaed," and an Andersen employee said in an e-mail to other employees that the order to destroy documents "came from the partner group and is considered VERY important." Similar instructions went out to other Andersen offices that

dealt with Enron matters, though at least one supervisor in another office refused to comply. That supervisor later explained his reaction as follows: "[I]f you think there is going to be some requirement to produce these documents, then don't destroy anything. For God's sake, just don't do that." J.A. 150-159, 168-169; Tr. 1849-1850, 1874-1881, 1886-1894, 1902-1905, 3241-3242, 4088-4089, 4791-4800, 4952, 4965, 5009, 5115, 5158-5168, 5210; GXs 1023F, 1023R, 1024E-1024F.

Following management's instructions, the Enron engagement team destroyed documents at an unprecedented clip. In fact, because the onsite shredder was operating at full capacity, additional documents had to be shipped to another office for shredding. A chart showing the quantity of shipped documents dramatically illustrates the massive spike in document destruction that coincided with notification of the SEC inquiry. J.A. 133. In addition to destroying paper documents, the Enron engagement team deleted tens of thousands of e-mails and other electronic documents—at least three times as many as normal. J.A. 133; Tr. 1897, 3239, 3896, 3951-3955, 3990, 4171-4175, 5035-5036, 5766-5767.

During the period from October 19 to November 9, it became increasingly clear that the SEC would issue a subpoena to petitioner. In considering the possibility of calling in petitioner's in-house forensic accountants to assist the Enron engagement team, Temple noted that doing so was "not unusual" and "[w]ill help with SEC and jury." On October 26, petitioner's second-ranking partner, in a covering e-mail to a *New York Times* article on the SEC investigation, stated: "[T]he problems are just beginning and we will be in the cross hairs. The marketplace is going to keep the pressure on this and is going to force the SEC to be tough." On October 30, the SEC opened a formal investigation and sent a follow-up letter to Enron, signed by two top SEC officials, expressing "serious concerns about recent revelations regarding limited partnership transactions at Enron" and requesting certain public disclosures. Petitioner became

aware of the formal investigation by the following day. Meanwhile, petitioner discovered two more major accounting problems—one involving suspected fraud by Enron relating to another special-purpose entity named "Chewco," and the other involving a large accounting error by petitioner itself. Numerous civil lawsuits were filed against Enron, and petitioner received a subpoena for Enron-related documents in connection with one of those suits. J.A. 121-124; Pet. C.A. Reply Br. 28 n.10; GXs 928B, 1026A; Tr. 505-507, 1179-1183, 1372, 1931-1938, 1944-1956, 3654, 4591, 4605-4608, 4683-4684, 5157-5158, 5602-5609.

Notwithstanding all of those developments, petitioner continued to shred Enron-related documents. And it did so even though both Duncan and Temple were warned of the dangers of destroying those documents. On October 26, Andersen partner John Riley heard the sound of a shredder and confronted Duncan, warning him that "this wouldn't be the best time in the world for you guys to be shredding a bunch of stuff." Duncan agreed that the "worst-case scenario" in a "situation like this" would be "people * * * destroying a lot of documents," but took no action. On October 31, Andersen partner David Stulb saw Duncan looking at a document that used the phrase "smoking gun" in reference to Watkins's initial warnings about Enron's accounting scandals. After reading the "smoking gun" reference aloud and stating, "[w]e don't need this," Duncan started to destroy the document. Stulb warned Duncan of the need to retain "all of this information" because of the "strong likelihood" that the SEC, among others, would be interested. Stulb later informed Temple that Duncan needed guidance on document retention. Temple promised to take care of the matter, but did nothing. J.A. 170-171, 175-177; Tr. 5900-5901.

On November 8 (the deadline for responding to the SEC's October 30 letter), Enron announced that it would issue a comprehensive restatement of its earnings and assets. That same day, the SEC served petitioner and Enron with sub-

poenas. On November 9, Duncan's secretary sent an e-mail to the Enron engagement team entitled "No More Shredding," which stated: "Per Dave—No more shredding. * * * We have been officially served for our documents." On December 2, Enron filed for bankruptcy. In January 2002, petitioner announced that it would fire Duncan and suspend other partners on the Enron engagement team. Pet. App. 6a-7a; Tr. 4590, 5691, 5720-5725, 5928-5932; GXs 1108A, 1108C, 1109A.

2. On March 7, 2002, petitioner was indicted in the United States District Court for the Southern District of Texas on one count of corruptly persuading persons with the intent to cause them to withhold documents from, or alter documents for, an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B). J.A. 134-140.[5] Duncan subsequently pleaded guilty to one count of the same offense. Tr. 1666.

At the close of trial, the government requested a jury instruction defining the statutory term "corruptly" as "having an improper purpose," and further specifying that, "[i]n order to establish that [petitioner] acted corruptly, it is not necessary for the government to prove that [petitioner] knew its conduct violated the criminal law." R. 284. The government also sought to define an "official proceeding" as "a proceeding before a federal court, judge, or agency," and to specify that "[a]n official proceeding includes all of the steps and stages in the agency's performance by an agency of its governmental functions * * * both formal and informal." R. 279-280.

[5] Petitioner does not dispute, and well-established law provides, that a partnership may be held criminally liable for the acts of an agent or employee acting within the scope of his agency or employment, provided that the agent or employee was acting at least in part with the intent to benefit the partnership. See, *e.g.*, *United States* v. *A&P Trucking Co.*, 358 U.S. 121, 126-127 (1958).

Petitioner requested an instruction stating that "[a] person persuades another person 'corruptly' only if he or she (1) uses an improper method, such as bribery or other unlawful means, to induce that person to act; or (2) persuades the other person to do something that they would not have had a lawful right to do had they been acting on their own." R. 146. Petitioner also requested an instruction stating that "[a]n otherwise innocent act of persuasion is not 'corrupt' if it is undertaken with a genuine belief that the persuasion is not improper or unlawful, even if its purpose is to make information unavailable to an official proceeding." R. 145. In addition, petitioner asked the court to specify that "the 'official proceeding' must be one that is ongoing or has been scheduled to be commenced in the future," R. 148, and that "an informal inquiry conducted by SEC staff * * * is not an 'official proceeding,'" R. 147.

The district court rejected petitioner's proposed instructions. Pet. App. 36a-45a. The court noted that the term "corruptly" was also used in the general obstruction-of-justice statute, 18 U.S.C. 1503, and had been defined in that statute to mean "with an improper purpose." Pet. App. 37a. The court concluded that "the same meaning must be applied to 'corruptly' in § 1512." *Id.* at 38a. The court observed that case law from other circuits supported the "improper purpose interpretation of § 1512." *Ibid.* The court also concluded that "specific knowledge of the law is not required under § 1512(b)." *Id.* at 42a. Finally, the court reasoned that "a 'proceeding' is not restricted to formal adjudicative process," *id.* at 43a, and rejected petitioner's contention that an "official proceeding" must be ongoing or scheduled at the time of the document destruction, *id.* at 44a.

The court subsequently instructed the jury that "[t]he word 'corruptly' means having an improper purpose." J.A. 212. Borrowing from (and slightly modifying) the Fifth Circuit's model jury instructions for Section 1503, the court then elaborated on that definition, stating that "[a]n improper

purpose for this case is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." *Ibid.* The court also informed the jury that "it is not necessary for the Government to prove that [petitioner] knew that its conduct violated the criminal law." J.A. 213. The court defined an "official proceeding" as "a proceeding before a federal court, judge, or agency" and specified that "[a] proceeding * * * includes all of the steps and stages in the agency's performance of its governmental functions * * * both formal and informal." J.A. 211. The court added that "it is not necessary for the Government to prove that an official proceeding was pending or even about to be initiated at the time the obstructive conduct occurred." J.A. 213. The jury found petitioner guilty.

3. The court of appeals affirmed. Pet. App. 1a-34a.

a. The court of appeals held that the jury instructions correctly defined the statutory term "corruptly." Pet. App. 17a-25a, 28a-29a. The court of appeals noted that courts interpreting the term "corruptly" in other obstruction-of-justice statutes had defined it to require an improper purpose, and that a majority of circuits interpreting the term "corruptly" in Section 1512(b) had defined it in similar terms. *Id.* at 19a. The court of appeals also reasoned that the district court correctly rejected petitioner's proposed instructions on the definition of "corruptly." *Id.* at 23a-25a, 28a-29a. In upholding the rejection of petitioner's proposed instruction that "the only way corrupt persuasion may be found is by an improper method or a violation of an independent legal duty," the court of appeals noted that no other court had endorsed that approach. *Id.* at 23a. The court of appeals added that "[petitioner] * * * gives no explanation why 'improper purpose' should require unlawful conduct" or "improper means." *Id.* at 24a. Instead, the court observed, "the means used would seem to be relevant only to the extent that they shed light on whether the purpose was improper." *Ibid.* The court reasoned that "[t]he statute would

have little independent reach * * * if it could be violated only through bribery or suborning perjury because such conduct is to a large extent criminalized in other provisions of the criminal code." *Ibid.* The court likewise rejected petitioner's contention that the jury should have been instructed that "corruptly" requires knowledge of wrongdoing, noting that "[t]he general rule * * * is that ignorance of the law is no defense." *Id.* at 29a. The court reasoned that, "[w]hen Congress wishes to avoid the general rule, it usually does so by requiring that a defendant act willfully or with specific intent to violate the law." *Ibid.*

b. The court of appeals also held that the jury instructions correctly defined the phrase "official proceeding." Pet. App. 25a-28a. Like the district court, the court of appeals rejected petitioner's contention that an "official proceeding" must be ongoing or scheduled at the time the document destruction occurred. *Id.* at 26a. The court reasoned that such a reading "defie[d]" the statutory provision that specifies that an official proceeding need not be pending or about to be instituted at the time of the offense. *Ibid.* (citing 18 U.S.C. 1512(e)(1) (2000)). The court also rejected petitioner's related contention that a defendant must "ha[ve] in mind a particular proceeding that it sought to obstruct" at the time the document destruction occurred. *Id.* at 26a-27a. The court again observed that this requirement "ignores the statutory language, which does not require a defendant to know that the proceeding is pending or about to be initiated." *Id.* at 27a. To the extent that the failure to impose such a requirement could criminalize the conduct of innocent defendants, the court reasoned that "[t]hat case is not before us," but added that "[t]he answer * * * may lie with the sound application of the elements of corrupt purpose and intent." *Ibid.*

SUMMARY OF ARGUMENT

Petitioner was validly convicted of corruptly persuading its employees with the intent to cause them to withhold documents from, or alter documents for, an official proceeding, in violation of 18 U.S.C. 1512(b)(2)(A) and (B). Petitioner portrays its document-destruction campaign, in the face of a looming SEC investigation, as wholly legitimate conduct (Br. 20-24)—as if American corporations routinely find it proper to instruct their employees to lay waste to vast troves of documents when a government investigation is viewed as highly probable. Nothing could be farther from the truth. Petitioner was not charged with having a document destruction policy as such. As the court of appeals recognized, "[t]here is nothing improper about following a document retention policy when there is no threat of an official investigation." Pet. App. 25a. But when, after realizing that a government investigation is bearing down on it, a company seizes on a dormant or widely ignored document policy and uses it as a pretext to destroy evidence of its own or its client's potential misconduct, it is altogether another matter. No responsible entity would engage in such conduct; petitioner's own document policy prohibited it. Petitioner's elaborate claims notwithstanding, its conduct represents a serious departure from well-established principles in the criminal law, and its conviction under Section 1512(b) should be affirmed.

I. The lower courts correctly defined the term "corruptly" in Section 1512(b) as "having an improper purpose" "to subvert, undermine, or impede the fact-finding ability of an official proceeding." The lower courts' definition is consistent with the purpose-based definition long given to the identical term in the general obstruction-of-justice statute, 18 U.S.C. 1503, on which Section 1512 was based; in other obstruction-of-justice statutes; and in other federal criminal statutes more generally. That definition does not render the

term "corruptly" superfluous. Nor does it criminalize conduct that is not inherently wrongful, because it has long been understood that it is improper to destroy documents when litigation is anticipated for the purpose of frustrating the truthseeking process.

Petitioner's novel alternative definitions of the term "corruptly"—which would require either "proof of improper means of persuasion or inducement to unlawful acts," or "proof of consciousness of wrongdoing"—should be rejected. The former definition cannot be reconciled with the text of the statute; would give the term "corruptly" a different meaning in Section 1512(b) than in other obstruction-of-justice statutes; and would criminalize little, if any, conduct that is not already criminalized by other provisions. The latter definition contravenes the established principle that ignorance of the law is no defense, and no exception to that principle is warranted here.

Neither the rule of lenity, the doctrine of constitutional doubt, nor constitutional principles of fair warning justify petitioner's alternative definitions of "corruptly." The rule of lenity and the doctrine of constitutional doubt are both inapplicable here, because the term "corruptly" is not ambiguous. Petitioner identifies no serious constitutional concerns arising from the lower courts' construction of the statute, and petitioner had fair warning that its conduct was unlawful.

II. The district court correctly instructed the jury on the definition of the phrase "official proceeding." Petitioner first contends that the district court should have instructed the jury that the government was required to prove that petitioner believed that an official proceeding was likely to occur in the near future. Petitioner did not request such an instruction, and the failure to give it was not plainly erroneous. Although petitioner did request an instruction that the government was required to show that petitioner intended to obstruct some *particular* proceeding, the statute cannot

be interpreted to require such a showing when no proceeding had yet been instituted, and petitioner was not prejudiced by the failure to provide any such instruction because the evidence left no doubt that the SEC's Enron investigation was the "proceeding" at issue.

Finally, petitioner contends that the district court erroneously instructed the jury that an informal SEC proceeding could constitute an "official proceeding." Petitioner waived that claim by failing to preserve it in the court of appeals. Even assuming that petitioner properly preserved that argument, petitioner's contention lacks merit. The statute authorizing the SEC to conduct investigations treats all investigations as proceedings, and courts have consistently considered agency investigations, even preliminary ones, to be "proceedings" for purposes of a companion statute, 18 U.S.C. 1505. And because an intent to obstruct an *informal* investigation necessarily implies an ultimate intent to obstruct a *formal* investigation, any instructional error by the district court was harmless.

ARGUMENT

PETITIONER WAS PROPERLY CONVICTED OF CORRUPTLY PERSUADING ITS EMPLOYEES WITH THE INTENT TO CAUSE THEM TO WITHHOLD DOCUMENTS FROM, OR ALTER DOCUMENTS FOR, AN OFFICIAL PROCEEDING, IN VIOLATION OF 18 U.S.C. 1512(b)(2)(A) AND (B)

I. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY ON THE DEFINITION OF THE TERM "CORRUPTLY"

In 1988, Congress amended Section 1512(b) to impose criminal sanctions on any person who "corruptly persuades" another person not to testify in, or to withhold evidence from or alter evidence for, a pending or future official proceeding. The jury was instructed that the term "corruptly" requires a defendant to act with "an improper purpose," is, "an intent

to subvert, undermine, or impede the fact-finding ability of an official proceeding." That definition is consistent with the purpose-based definition that federal criminal law has long assigned to the term "corruptly." Petitioner instead seeks (Br. 20-42) to impose on the term "corruptly" a novel requirement of proof either that the defendant "corrupt" the person persuaded (either by using an improper means or by inducing unlawful acts), or, alternatively, that the defendant believed its conduct was "wrongful." The courts below correctly rejected that unprecedented requirement and instead adhered to the traditional, purpose-based definition of the term.

A. The Lower Courts Correctly Defined The Term "Corruptly" As "Having An Improper Purpose" "To Subvert, Undermine, Or Impede The Fact-Finding Ability Of An Official Proceeding"

1. The term "corruptly" is similarly defined in other obstruction-of-justice statutes

The lower courts' definition of the term "corruptly" in Section 1512(b) was drawn from, and is wholly consistent with, the settled definition of that term in other obstruction-of-justice statutes.

a. In 1831, Congress enacted the general obstruction-of-justice statute that is now codified at 18 U.S.C. 1503. See Act of Mar. 2, 1831, ch. 99, § 2, 4 Stat. 487. The so-called "omnibus" clause of that statute, which has remained largely unchanged, imposes criminal sanctions on any person who "corruptly * * * influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." Lower courts construing that clause have consistently held that the term "corruptly" supplies a state-of-mind requirement. Although they have not used identical formulations in articulating that requirement, they have uniformly held that the term "corruptly" requires a defendant to act with an improper purpose: namely, an

intent to obstruct justice. See, *e.g.*, *United States* v. *Machi*, 811 F.2d 991, 996 (7th Cir. 1987) (upholding instruction that "corruptly means to act with the purpose of obstructing justice"); *United States* v. *Jeter*, 775 F.2d 670, 679 (6th Cir. 1985) (holding that, in order to violate the statute, "one must impede the due administration of justice with the general intent of knowledge *as well as the specific intent of purpose to obstruct*"), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981) (holding that "the word 'corruptly' as used in the statute means that the act must be done with the purpose of obstructing justice"), cert. denied, 454 U.S. 1157 (1982); *United States* v. *Ogle*, 613 F.2d 233, 238-239 (10th Cir. 1979) (approving instruction defining "corruptly" as "an endeavor to influence a juror in the performance of his or her duty, or to influence, obstruct or impede the due administration of justice"), cert. denied, 449 U.S. 825 (1980).[6] Drawing on those cases, model jury instructions for Section 1503 define the term "corruptly" similarly. See, *e.g.*, 2A Kevin F. O'Malley et al., *Federal Jury Practice and Instructions: Criminal* § 48.04, at 456 (5th ed. 2000) (defining "corruptly" as "voluntarily and deliberately and for the purpose of improperly influencing, or obstructing, or interfering with the administration of justice"); 2 Leonard B. Sand et al., *Modern Federal Jury Instructions: Criminal* ¶ 46.01, at 46-6 (2004) (defining "corruptly" as "simply having the improper motive or purpose of obstructing justice").[7]

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[6] Some courts have held, in prosecutions under Section 1503, that an intent to obstruct justice can be inferred if the natural and probable consequence of a defendant's actions will be to obstruct a judicial proceeding. See, *e.g.*, *United States* v. *Schwarz*, 283 F.3d 76, 109 (2d Cir. 2002); *United States* v. *Fleming*, 215 F.3d 930, 938 (9th Cir. 2000); *United States* v. *Brooks*, 111 F.3d 365, 372 (4th Cir. 1997).

[7] Petitioner suggests (Br. 22) that "courts have not 'uniformly' instructed juries in § 1503 cases that 'corrupt' means an 'improper purpose to impede fact finding.'" The authorities it cites in support, however, stand only for the (unsurprising) proposition that courts have used slightly different formulations in elaborating on the "improper purpose" that is required. Petitioner relies on the jury instruction given by the district court in *United States* v. *Aguilar*, 515 U.S. 593 (1995), and quoted by Justice Scalia in his separate opinion. See *id.* at 616-617 (opinion concurring in part and dissenting in part). The Court, however, did not pass on the validity of that instruction, which used a formulation of the definition of "corruptly" (apparently taken from a since-superseded model jury instruction, see *Ninth Circuit Manual of Model Jury Instructions* (*Criminal*) § 8.108 (2003)) that is consistent—unlike petitioner's approach—with the purpose-based approach used in this case, see pp. 24-26, *infra*. Petitioner also relies on the D.C. Circuit's statement that "[c]ourts construing § 1503 have adopted a wide variety of interpretations." *United States* v. *Poindexter*, 951 F.2d 369, 385 (1991), cert. denied, 506 U.S. 1021 (1992). The case cited by the D.C. Circuit for that proposition, however, cites only a single (Section 1505) case that also used a purpose-based definition of "corruptly." See *United States* v. *North*, 910 F.2d 843, 941 n.14 (D.C. Cir.) (Silberman, J., concurring in part and dissenting in part) (citing *United States* v. *Mitchell*, 877 F.2d 294 (4th Cir. 1989)), modified on reh'g, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991).

b. The history of Section 1512 demonstrates that the term "corruptly" in that section should be defined, as in Section 1503, to require an intent to obstruct justice. In addition to its "omnibus" clause, Section 1503 previously contained a separate witness-tampering clause, imposing criminal penalties on any person who "corruptly [or coercively] endeavors to influence, intimidate, or impede any witness" in a federal judicial proceeding. In 1982, Congress deleted that clause and recodified it in new Section 1512, but without the current "corruptly persuades" element. See Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, § 4(a), 96 Stat. 1248. Thus, as originally enacted in 1982, Section 1512 covered only coercive (or deceptive) conduct. It did not prohibit non-coercive, non-deceptive witness tampering—conduct that was previously covered under Section 1503's witness-tampering clause. See, *e.g.*, *United States* v. *Jackson*, 607 F.2d 1219, 1223 (8th Cir. 1979), cert. denied, 444 U.S. 1080 (1980); *United States* v. *Howard*, 569 F.2d 1331, 1334 (5th Cir.), cert. denied, 439 U.S. 834

(1978). Congress's omission gave rise to a circuit split: although most courts to address the issue held that non-coercive, non-deceptive witness tampering could continue to be prosecuted under the "omnibus" clause of Section 1503, see *United States* v. *Tackett*, 113 F.3d 603, 607 (6th Cir. 1997) (listing cases), cert. denied, 522 U.S. 1089 (1998), the Second Circuit concluded that Congress intended Section 1512 to serve as the exclusive means for prosecuting witness tampering of any kind, see *United States* v. *Hernandez*, 730 F.2d 895, 898-899 (2d Cir. 1984).

In response, Congress amended Section 1512 in 1988 to add "corruptly persuades" to the list of prohibited conduct. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(a) and (c), 102 Stat. 4397, 4398. Where, as here, Congress uses a term that is also found in a closely related statute, and where the term had long been given a consistent meaning in that statute, Congress is presumed to have intended to give the term the same meaning in the new statute, absent affirmative indication to the contrary. See, *e.g.*, *Salinas* v. *United States*, 522 U.S. 52, 63 (1997); *Morrissette* v. *United States*, 342 U.S. 246, 263 (1952); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 59 (1911). The legislative history confirms the applicability of that presumption: a section-by-section analysis of the legislation clarifies that Congress added the "corruptly persuades" language to Section 1512 "merely to include in section 1512 the same protection of witnesses from non-coercive influence that was (and is) found in section 1503." 134 Cong. Rec. 32,701 (1988) (statement of Sen. Biden). Because the term "corruptly" in Section 1503 had long been defined to require an intent to obstruct justice, "[i]t is reasonable to attribute to the 'corruptly persuade' language in Section 1512(b), the same well-established meaning." *United States* v. *Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998), cert. denied, 525 U.S. 1177 (1999).

c. The term "corruptly" appears in several other provisions in the obstruction-of-justice chapter of Title 18 of the United States Code. See 18 U.S.C. 1505; 18 U.S.C. 1512(c) (Supp. II 2002); 18 U.S.C. 1517. Most notably, Section 1505, enacted in 1940, imposes criminal sanctions on any person who "corruptly * * * influences, obstructs, or impedes or endeavors to influence, obstruct or impede" (1) "the due and proper administration of law" in administrative proceedings, or (2) "the due and proper exercise of the power of inquiry" in congressional proceedings. At the time Congress enacted (and modified) Section 1512, courts had construed "corruptly" in Section 1505 to have the same meaning as "corruptly" in the statute on which it was modeled, Section 1503. See, *e.g.*, *United States* v. *Laurins*, 857 F.2d 529, 536-537 (9th Cir. 1988) ("The specific intent required for obstruction of justice under sections 1503 and 1505 is that the defendant must have acted 'corruptly,' *i.e.*, that the act must be done with the purpose of obstructing justice."), cert. denied, 492 U.S. 906 (1989); *United States* v. *Abrams*, 427 F.2d 86, 90 (2d Cir.) (upholding instruction that "corruptly" means "with improper motive, a bad and evil purpose"), cert. denied, 400 U.S. 832 (1970). When the D.C. Circuit later held that the term "corruptly" rendered Section 1505 unconstitutionally vague on an as-applied basis, *United States* v. *Poindexter*, 951 F.2d 369, 379, 385 (1991), cert. denied, 506 U.S. 1021 (1992), Congress amended the statute to define "corruptly" as "acting with an improper purpose, personally or by influencing another," 18 U.S.C. 1515(b).[8] Just as Congress is presumed to have intended to give the term "corruptly" the same meaning in Section 1512(b) as it had in Section 1503, so

[8] It is insignificant that Congress defined "corruptly" only for purposes of Section 1505, and not for purposes of other provisions (such as Section 1503 or Section 1512(b)) that use the same term. See 141 Cong. Rec. 14,956 (1995) (statement of Sen. Levin) (noting that "[t]he definition applies only to section 1505 because the Poindexter decision interprets only that section"). Congress enacted the definitional provision in Section 1515(b) for the limited purpose of overruling *Poindexter*'s "nonsensical" interpretation. See 142 Cong. Rec. 25,468 (1996) (statement of Sen. Bryan).

too is Congress presumed to have intended to give the term the same meaning as it had in Section 1505.

2. Petitioner's criticisms of the lower courts' definition are unfounded

Petitioner offers four primary criticisms of the lower courts' definition of "corruptly." Those criticisms lack merit.

a. Petitioner contends (Br. 30) that it would be "positively nonsensical" to construe the term "corruptly" in Section 1512(b) to make it illegal in some circumstances to persuade another person to destroy documents when it would not be illegal for that person to destroy the documents himself. To the extent that there was any inconsistency in the statutory treatment of obstructive conduct, however, it was deliberately created by Congress. Sections 1503 and 1505, which prohibit obstructive actions such as the destruction of documents, have long been construed to require (1) an ongoing proceeding at the time of the obstructive action, and (2) knowledge of that ongoing proceeding by the obstructing party. See *Pettibone* v. *United States*, 148 U.S. 197, 207 (1893). But when Congress initially enacted Section 1512, it made clear that an individual could be criminally liable for coercing or deceiving another individual into destroying documents (and, later, for corruptly persuading another individual to destroy documents) even if no official proceeding was pending or about to be instituted. See 18 U.S.C. 1512(e)(1) (now codified at 18 U.S.C. 1512(f)(1) (Supp. II 2002)). Contrary to petitioner's suggestion (Br. 31), therefore, Congress expressly chose not to apply the "*Pettibone* rule" to cases involving witness tampering, even though it applies under Sections 1503 and 1505 to an individual's own conduct.[9]

[9] The legislative history confirms that this provision was included to "obviate[] the requirement that there be an official proceeding in progress or pending" and thereby "increase[] the scope of this section by expanding the galaxy of witnesses and victims the protections of its language is *[sic]* meant to embrace." S. Rep. No. 532, 97th Cong., 2d Sess. 19 (1982).

To the extent that any gap in statutory coverage existed, Congress has since eliminated it. As part of the Corporate and Criminal Fraud Accountability Act of 2002 (Sarbanes-Oxley Act), Pub. L. No. 107-204, 116 Stat. 800, Congress enacted new Section 1512(c), which prohibits individuals from "corruptly" engaging in obstructive actions (such as the destruction of documents) even if no official proceeding is pending or about to be instituted. See 18 U.S.C. 1512(c) (Supp. II 2002). Congress also enacted other provisions pertaining specifically to document retention and destruction. See 18 U.S.C. 1519 (Supp. II 2002) (prohibiting individuals from knowingly destroying or altering documents "with the intent to impede, obstruct, or influence" any official proceeding or "in relation to or contemplation of" any such proceeding); 18 U.S.C. 1520 (Supp. II 2002) (imposing criminal sanctions on accountants for failing to maintain "all audit or review workpapers" for five years and requiring the SEC to promulgate further requirements for the "retention of relevant records").

Petitioner asserts (Br. 30) that it would be erroneous to take those provisions into account because doing so would "commit[] the classic error of relying on subsequent legislative history to interpret the product of an earlier Congress." But the government's interpretation does not do so. Rather, it is *petitioner* that relies on the legislative history of the Sarbanes-Oxley Act in contending that Congress "recognized" that Section 1512(b) did not cover its conduct. See Pet. Br. 19 & n.22 (citing S. Rep. No. 146, 107th Cong., 2d Sess. 7 (2002)). The cited legislative history, however, does not indicate that members of a later Congress believed that petitioner's conduct was not covered by Section 1512(b): at most, it suggests that they believed only that, to the extent that there was any anomaly in the respective scope of

Sections 1505 and 1512, it was Section 1505 that was too narrow, not Section 1512 that was too broad. See S. Rep. No. 146, *supra*, at 7 (noting that it was unclear whether criminal liability would attach "in a [similar] case with a single person doing the shredding"). A later Congress's concerns about the underinclusiveness of the criminal law as to single-actor obstructive conduct do not shed any light on the reach of the earlier-enacted "corruptly persuades" prohibition.

b. Petitioner next claims (Br. 27-28) that the lower courts' definition of "corruptly" renders that term superfluous in view of the statutory requirement that a defendant have acted with the "intent" to cause another person to "withhold" documents from, or "alter" documents "to impair [their] availability for use in," an official proceeding. See 18 U.S.C. 1512(b)(2)(A) and (B). Petitioner errs in suggesting (Br. 28) that "[t]here is simply no space" between the intent to "deprive" an agency of documents and the intent to "subvert, undermine, or impede" the agency's fact-finding. An individual could act intentionally to have documents withheld from an official proceeding out of any number of motives besides a desire to obstruct the proceeding: for example, a person could persuade another person to delete e-mails to prevent them from being disclosed simply because they contained embarrassing material. As the Fifth Circuit noted, the former intent "implies a degree of personal culpability beyond a mere intent to make documents unavailable." Pet. App. 22a.

c. Nor is the lower courts' definition of the term "corruptly" irreconcilable with definitions of that term in other statutory contexts, as petitioner contends (Br. 22-23, 25-26). Each of the precise formulations of the definition of "corruptly" on which petitioner relies adopts a purpose-based approach that focuses on the defendant's improper motive. Petitioner first notes (Br. 26 & nn.28-29) that some courts—mainly in the bribery context—have defined "corruptly" as "with the intent to give some advantage inconsistent with official duty and the rights of others." *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V.* v. *Schreiber*, 327 F.3d 173, 181-183 (2d Cir. 2003) (construing "corruptly" in 15 U.S.C. 78dd-2); *United States* v. *Rooney*, 37 F.3d 847, 852-853 (2d Cir. 1994) (construing "corruptly" in 18 U.S.C. 666(a)); *United States* v. *Reeves*, 752 F.2d 995, 1000 (5th Cir.) (construing "corruptly" in 26 U.S.C. 7212(a)), cert. denied, 474 U.S. 834 (1985); see also *United States* v. *Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part) (quoting definition of "corruptly"). Unlike petitioner's proposed definition, however, that formulation turns entirely on the defendant's intent. And that formulation is readily reconcilable with the lower courts' definition, because an individual who acts with an intent to obstruct an official proceeding necessarily seeks some advantage inconsistent with official duty and the rights of others. See, *e.g.*, *Reeves*, 752 F.2d at 1002.

Petitioner also notes (Br. 26 n.28) that some courts have defined "corruptly" as "with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." *E.g.*, *United States* v. *Strand*, 574 F.2d 993, 996 (9th Cir. 1978). That formulation is primarily used in cases arising under federal bribery statutes, such as 18 U.S.C. 201.[10] Once again, that formulation critically differs from petitioner's definition, be-

[10] That formulation also appears, without elaboration, in the legislative history of two statutes, 18 U.S.C. 1032 and 18 U.S.C. 1517, enacted *after* Congress added the "corruptly persuades" prohibition to Section 1512(b). See H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1, at 173 n.3, 174 n.5 (1990). That legislative history quotes from a model jury instruction defining "corruptly" for purposes of the *bribery* statute, which adds that "a person acts 'corruptly' whenever he makes a willful attempt to persuade or influence the official action of a public official, by an offer of money or anything of value." 2 Edward J. Devitt & Charles B. Blackmar, *Federal Jury Practice and Instructions* § 34.08, at 110 (3d ed. 1977).

cause petitioner did not argue in the district court, and does not argue in this Court, that "corruptly" should be defined to require proof of an *intent* to use improper means or accomplish an unlawful act, but instead only that it should be defined to require proof of an improper means or an unlawful act *simpliciter*. See, *e.g.*, Br. 28 (contending that "interpreting 'corruptly' as just another 'purpose' requirement makes little sense"). In any event, that formulation is also consistent with the purpose-based approach given here. The term "unlawful" in that formulation does not mean "otherwise illegal": clearly, a defendant need not violate some other law, or intend for some other law to be violated, in order to bribe a government official. Instead, "unlawful" simply means "in violation of official duty." *United States* v. *Bonito*, 57 F.3d 167, 171 (2d Cir. 1995), cert. denied, 516 U.S. 1049 (1996). As so construed, that formulation is substantially similar to the definition used below, and to the other formulation on which petitioner relies.

d. Petitioner contends (Br. 21-22, 23-24) that the lower courts' definition of "corruptly" would criminalize "a wide variety of common conduct" that is not inherently wrongful. As an initial matter, petitioner cannot seriously contend that its *own* conduct—namely, the destruction of thousands of documents at a time when it believed that an SEC investigation was either likely or ongoing—falls into that category. Indeed, petitioner itself conceded before Congress that David Duncan's conduct was "simply unacceptable," noting that there was "every appearance of destroying these materials in anticipation of a government request for documents." GX 2002K.

Petitioner thus more broadly suggests (Br. 21-22) that the lower courts' definition of "corruptly" would criminalize some behavior that is sanctioned by so-called document "retention" policies adopted by many corporate entities, including petitioner. Even before the enactment of the recent Sarbanes-Oxley Act, however, many of those policies, including petitioner's, contained provisions expressly prohibiting the destruction of documents when litigation or investigations were deemed to be likely. See, *e.g.*, J.A. 29-30, 44, 65. Moreover, to the extent that document policies did not themselves contain express restrictions, it was the prevailing view at the time of petitioner's conduct that document destruction was improper, even if otherwise permitted by a document policy, under such circumstances.[11]

In a similar vein, petitioner suggests (Br. 23-24) that, even if conduct undertaken with an intent to impede *judicial* proceedings is inherently wrongful, conduct undertaken with an intent to impede congressional or agency proceedings is not. By its terms, however, Section 1512(b) draws no distinction between judicial proceedings and congressional or agency proceedings, but instead prohibits obstructive conduct directed toward all types of "official proceedings." The D.C. Circuit opinions on which petitioner relies involved not Section 1512(b) but Section 1505, which more broadly prohibits *any* endeavor to impede, obstruct, or so much as "influence" a congressional or agency proceeding (and is not constrained by any other intent requirement). See *United States* v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), cert.

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[11] See, *e.g.*, W. Russell Welsh & Andrew C. Marquardt, *Spoliation of Evidence*, 23 WTR Brief 9, 36-37 (1994) ("[A] corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy."); Bruce G. Vanyo & Terry T. Johnson, *The Pretrial Phase: A Practical Guide for the Non-Litigator*, 584 PLI/Corp 247, 286 (1987) ("Obviously, a document retention policy cannot serve as a vehicle for destroying documents that a party anticipates would be relevant in prospective litigation."); cf. *Lewy* v. *Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988) (noting that company's destruction of documents pursuant to document policy could still give rise to adverse inference if party "knew or should have known that [the documents] would become material at some point in the future"); Michael R. Overly & Chanley T. Howell, *Document Retention in the Electronic Workplace* 48 (2001) (citing *Lewy* for proposition that "[a] record retention and destruction policy alone will not necessarily shield a corporation from sanctions").

denied, 506 U.S. 1021 (1992); *United States* v. *North*, 910 F.2d 843 (D.C. Cir.), modified on reh'g, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991). And to the extent that those opinions drew a distinction concerning the comparative wrongfulness of obstruction of judicial proceedings and of congressional or agency proceedings, Congress effectively overrode that judgment by amending the obstruction-of-justice statutes to clarify that Section 1505 has the same scope as Section 1503. See pp. 20-22, *supra*.

Finally, petitioner lists a number of hypothetical cases (Br. 24) in which, it contends, the lower courts' definition of "corruptly" would criminalize seemingly innocent conduct. All of those hypotheticals, however, are distinguishable. In some of those hypotheticals (*e.g.*, when a person advises a family member to assert his Fifth Amendment privilege), the would-be defendant does not act with the requisite "intent to subvert, undermine, or impede the fact-finding ability of an official proceeding" at all, but instead acts with a different intent (*e.g.*, an intent to protect another person from self-incrimination). In other hypotheticals (*e.g.*, when a person instructs another person in good faith to assert a legal privilege in response to a subpoena), liability would not attach under Section 1512(b) even if the defendant acted with the requisite intent, because he did not "withhold" any information to which the requesting party was legally entitled. In still other hypotheticals (*e.g.*, when a person advises another person not to provide documents in response to a voluntary request), even if the defendant could be said to be "withholding" information at all, he *may* be able to argue that the government cannot prove that his action had the "natural and probable effect" of obstructing an official proceeding, since any withheld information could subsequently be sought by subpoena. See *Aguilar*, 515 U.S. at 599-600 (applying "nexus" requirement under Section 1503); see generally p. 44 n.24, *infra* (discussing whether the *Aguilar* "nexus" requirement applies under Section 1512(b)).

Finally, in the remainder of petitioner's hypotheticals (*e.g.*, when a lawyer advises his client in good faith not to volunteer information), the defendant could assert immunity from liability under Section 1515(c), which expressly provides that "[t]his chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or *anticipation of* an official proceeding." 18 U.S.C. 1515(c) (emphasis added).[12] Because the lower courts' definition of "corruptly" does not criminalize conduct that is not inherently wrongful, and because that definition is consistent with the text and history of Section 1512(b), petitioner's challenges to that definition lack merit.

B. Petitioner's Novel Definition Of The Term "Corruptly" Should Be Rejected

Instead of the lower courts' definition, petitioner proposes (Br. 25-37) that the term "corruptly" in Section 1512(b) be defined to require "proof of improper means of persuasion or inducement to unlawful acts" or, in the alternative, "consciousness of wrongdoing." No court has ever adopted either of those definitions of "corruptly" in construing any federal statute, and each of those definitions is deeply flawed.

1. The term "corruptly" does not require "proof of improper means of persuasion" or "inducement to unlawful acts"

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[12] Petitioner contends (Br. 27) that Section 1515(c) "is a guide to interpretation, not an affirmative defense." As amicus National Association of Criminal Defense Lawyers correctly notes (Br. 20-21), however, lower courts have consistently concluded that Section 1515(c) provides an affirmative defense. See *United States* v. *Kloess*, 251 F.3d 941, 948 (11th Cir. 2001); *United States* v. *Kellington*, 217 F.3d 1084, 1098 (9th Cir. 2000); *United States* v. *Davis*, 183 F.3d 231, 248 (3d Cir.), amended on reh'g, 197 F.3d 662 (3d Cir. 1999). To the extent that petitioner's conviction rested on the conduct of an in-house lawyer, see pp. 1-10, *supra*, petitioner is not entitled to obtain any relief on that basis (contrary to petitioner's suggestion, see Br. 50 n.44), because it failed to seek a jury instruction concerning, or otherwise invoke, Section 1515(c) during the trial.

a. Petitioner first contends (Br. 25-34) that a person acts "corruptly" for purposes of Section 1512(b) if he uses an improper means or induces another person to commit an unlawful act. That requirement cannot be reconciled with the text of the statute. Petitioner asserts (Br. 25) that such a requirement is consistent with a "transitive reading" of the adverb "corruptly." Adverbs, however, do not have "transitive" meanings: that term, in its grammatical sense, refers not to adverbs, but to *verbs*. See, *e.g.*, 18 *Oxford English Dictionary* 407 (2d ed. 1989) (defining "transitive" as "[o]f verbs and their construction: [e]xpressing an action which passes over to an object; taking a direct object to complete the sense"). If Congress had intended to convey the meaning that petitioner suggests, it likely would have imposed criminal sanctions on a person who "*corrupts* another person by means of persuasion"—not on a person who merely "corruptly *persuades* another person." Petitioner all but invites the Court to rewrite the statute in that manner. See, *e.g.*, Br. 25 (suggesting that "corruptly persuades" means "corrupting" a witness); Br. 25 n.27 (relying on dictionary definitions of the verb "corrupt"); Br. 34 (stating that "Congress simply intended to protect witnesses from attempts to 'corrupt' them as well as from attempts to coerce or intimidate them").[13]

Petitioner's "improper means or unlawful act" definition suffers from two other major flaws. First, as petitioner appears to concede (Br. 21), its definition would require the term "corruptly" to be given one meaning in Section 1512(b) and another in Sections 1503 and 1505. Because there is typically no separate "act" that is induced by the defendant in cases arising under Sections 1503 and 1505, the "unlawful act" component of petitioner's definition would ordinarily be inapplicable. And courts have rejected the argument that Sections 1503 and 1505 reach only a defendant's use of an "improper means." See, *e.g.*, *United States* v. *Brady*, 168 F.3d 574, 578-579 (1st Cir. 1999) (Section 1503); *United States* v. *Mitchell*, 877 F.2d 294, 299 (4th Cir. 1989) (Section 1505); *Ogle*, 613 F.3d at 239 (Section 1503). Petitioner's definition would therefore contravene the well-established canon of construction that identical words in closely related statutes are intended to have the same meaning, especially where one statute is enacted against the backdrop of the others. See pp. 19-20, *supra*.

Second, under petitioner's definition, the "corruptly persuades" prong of Section 1512(b) would criminalize little, if any, conduct that is not already criminalized by other provisions. Petitioner appears to equate an "improper" means of persuasion with an *unlawful* means of persuasion. See, *e.g.*, Br. 25, 26, 28. To the extent that the means used is unlawful, however, the "improper means" component would by definition reach only conduct that could be prosecuted on other grounds. The only examples petitioner provides, bribing or blackmailing a witness and urging perjury, all fall into that category. See 18 U.S.C. 201(b)(3) (bribery of witnesses); 18 U.S.C. 873 (blackmail); 18 U.S.C. 1622 (subornation of perjury). And the same could be said with regard to the "unlawful act" component of petitioner's definition, because the federal aiding-and-abetting statute already imposes criminal sanctions on anyone who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States." 18 U.S.C. 2(b).[14]

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[13] In a similar vein, petitioner contends (Br. 18) that "'corruptly persuades' appears in § 1512 in a list of unlawful *means*." That is incorrect. "Corruptly persuades" is one in a list of criminalized *actions*, and the action that is criminalized is "corruptly persuading," not "corrupting by means of persuasion."

[14] To the extent that the "unlawful act" component of petitioner's definition limits the scope of the "corruptly persuades" prohibition in Section 1512(b) mainly to cases in which the persuaded individual's conduct is itself unlawful under Section 1503 or Section 1505, that component is also in tension with Congress's explicit provision that an individual could be

b. Petitioner offers several defenses of its "improper means or unlawful act" definition, all of which are unavailing.

Petitioner suggests (Br. 27) that an "improper means or unlawful act" requirement is mandated by the canon of *ejusdem generis* (or, more appropriately, the canon of *noscitur a sociis*). Because every other action criminalized by Section 1512(b) ("uses intimidation," "threatens," and "engages in misleading conduct") involves wrongful conduct, the argument goes, "corruptly persuades" must be construed to involve wrongful conduct as well. At the outset, it is questionable whether all of those other actions are themselves inherently wrongful. See S. Rep. No. 532, 97th Cong., 2d Sess. 15 (1982) (noting that "innocent acts" can sometimes constitute intimidation). Even if they are, however, it does not follow that the term "corruptly" incorporates an "improper means or unlawful act" requirement. Persuading another person not to testify, or to withhold or alter documents, with "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," is itself "wrongful" conduct. See pp. 26-29, *supra*; cf. *Aguilar*, 515 U.S. at 617 (Scalia, J., concurring in part and dissenting in part) (noting that "[a]cts specifically intended to 'influence, obstruct, or impede, the due administration of justice' are obviously wrongful, just as they are necessarily 'corrupt'"). And to the extent that the "improper means" component of petitioner's definition reaches only conduct that is otherwise prohibited, petitioner's construction would affirmatively *violate* the canon of *noscitur a sociis*, because none of the other actions criminalized by the current version of Section 1512(b)—intimidating, threatening, or misleading another individual—is necessarily unlawful.

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criminally liable under Section 1512 even if no official proceeding is pending (as is required for criminal liability to attach under Section 1503 or Section 1505). See 18 U.S.C. 1512(e)(1) (2000); see generally pp. 22-24, *supra* (discussing old Section 1512(e)(1)).

Petitioner similarly errs in arguing (Br. 28-29) that its definition of "corruptly" is supported by Section 1515(a)(6), which provides that "the term 'corruptly persuades' does not include conduct which would be misleading conduct but for a lack of state of mind." Although petitioner contends (Br. 29) that Section 1515(a)(6) "must provide a defense for some defendants whose persuasion would otherwise be corrupt," petitioner in the same breath concedes (Br. 28) that, under its definition of "corruptly," Section 1515(a)(6) would merely "clarif[y]" that certain conduct already excluded from the scope of Section 1515(b) would remain excluded. Specifically, Section 1515(a)(6) would never be triggered because the defendant would never "lack" the state of mind required under the definition of "misleading conduct" in Section 1515(a)(3). Although Section 1515(a)(6) would have only limited application under the lower courts' definition of "corruptly," petitioner's definition would read Section 1515(a)(6) out of the statute altogether.[15]

Petitioner's reliance (Br. 29) on 18 U.S.C. 1512(c) (2000) (now codified at 18 U.S.C. 1512(d) (Supp. II 2002)) is equally misplaced. That provision imposes criminal penalties on any person who "intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person" from, *inter alia*, testifying in an official proceeding. Petitioner contends (Br. 29) that it would be "surprising" if Congress imposed lesser penalties on a defendant for dissuading another person from testifying by means of intentional harassment under old Section 1512(c) (*viz.*, up to one year of imprisonment) than for "politely persuading" another person not to testify under Section 1512(b) (up to

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[15] In addition, under petitioner's definition, Section 1515(c) would have little, if any, independent effect—as petitioner implicitly concedes (Br. 27). When a defendant uses an unlawful means, Section 1515(c) would never apply, since it provides a defense only in cases involving the provision of "*lawful*, bona fide, legal representation services." 18 U.S.C. 1515(c) (emphasis added).

ten years). Section 1512(b), however, differs critically from old Section 1512(c) because it requires not merely that the defendant act intentionally in the sense of volitionally and knowingly, but also that the defendant (1) act with the specific intent of causing or inducing another person to withhold testimony or withhold or alter documents, and (2) act "corruptly," *i.e.*, with the intent of subverting, undermining, or impeding the fact-finding ability of an official proceeding. The presence of that greater degree of mens rea amply justifies the imposition of greater sanctions.

Citing the legislative history, petitioner asserts (Br. 32-33) that the purpose of the original Section 1512 was to protect witnesses. See, *e.g.*, S. Rep. No. 532, *supra*, at 15. That assertion is true, but it is incomplete: as the language of the statute makes clear, the purpose of Section 1512 was not only to protect witnesses from being coerced or deceived into not testifying, but also to prevent persons from being coerced or deceived into withholding or altering documents or other evidence. In both cases, Congress's overriding concern was to "protect the integrity of the process." *Id.* at 19; cf. 128 Cong. Rec. 26,350 (1982) (statement of Rep. Rodino) (stating, in section-by-section analysis, that purpose of Section 1512 was not only to "protect[] witnesses," but also to "protect[] the integrity of Federal * * * proceedings").[16] And the legislative history of the "corruptly persuades" prohibition in Section 1512(b) specifically indicates that Congress intended to reach beyond cases in which the defendant used an improper means or induced an

[16] Petitioner notes (Br. 33) that the original version of what would become Section 1512 contained a broad obstruction-of-justice provision, which was deleted before the bill was passed. That deletion, however, was justified not merely on the ground that the provision was "beyond the legitimate scope of this witness protection measure," as petitioner contends, but also on the ground that the provision was "probably duplicative of [o]bstruction of justice statutes already in the books." 128 Cong. Rec. 26,810 (1982) (statement of Sen. Heinz).

unlawful act. See 134 Cong. Rec. 32,701 (1988) (statement of Sen. Biden) (defining the concept of "'[c]orrupt persuasion' of a witness" to include, without limitation, "a non-coercive attempt to induce a witness to become unavailable to testify").[17] Neither the legislative history of the original Section 1512, nor the legislative history of the "corruptly persuades" prong of Section 1512(b), thus supports petitioner's "transitive" definition of "corruptly."

2. The term "corruptly" does not require "consciousness of wrongdoing"

In the alternative, petitioner contends (Br. 34-37) that, if the term "corruptly" is given an "intransitive" meaning, the mens rea it describes should require "consciousness of wrongdoing." Petitioner offers no valid justification, however, for preferring its novel "consciousness of wrongdoing" requirement over the lower courts' more conventional intent requirement.

As an initial matter, petitioner errs by suggesting in its merits brief (Br. 34-35), for the first time in this litigation, that the term "knowingly" modifies the phrase "corruptly persuades."[18] Whether or not modified by "knowingly," however, the term "corruptly" cannot be read to require "consciousness of wrongdoing." To the extent that petitioner argues that "corruptly" requires knowledge of *unlawfulness*, petitioner cannot overcome the "venerable principle

[17] Petitioner argues (Br. 34 n.34) that Senator Biden's comments on the VWPA referred only to Section 1503 cases in which the "corrupt persuasion" involved "independently wrongful efforts to influence witnesses." Senator Biden made clear, however, that he was offering only "[e]xamples" of "corrupt persuasion," not an exhaustive catalog of covered conduct. See 134 Cong. Rec. 32,701 (1988).

[18] It seems questionable whether Congress would employ such an inelegant formulation as "knowingly * * * corruptly persuades," and it is uncertain what petitioner believes the term "knowingly" would add, since that term is ordinarily used to require only knowledge of the pertinent facts, see, *e.g.*, *Bryan* v. *United States*, 524 U.S. 184, 192-193 (1998), and the term "corruptly" already implies such a requirement.

that ignorance of the law generally is no defense to a criminal charge." *Ratzlaf* v. *United States*, 510 U.S. 135, 149 (1994). Petitioner does not cite a single case in which a court has interpreted the word "corruptly"—whether in Section 1512(b), another obstruction-of-justice statute, or any other federal criminal statute—to require proof that the defendant knew his conduct was unlawful.

In support of its definition, petitioner primarily relies (Br. 35-36 & n.35) on this Court's decision in *Ratzlaf*, *supra*. In that case, this Court construed the term "willfully" to require proof of specific knowledge of unlawfulness, on the ground that the act of currency structuring, absent such proof, was not "inevitably nefarious" or "invariably motivated by a desire to keep the Government in the dark." 510 U.S. at 145. Here, by contrast, under the lower courts' definition of "corruptly," the covered act of corruptly persuading another person to withhold testimony or withhold or alter documents *is* "inevitably nefarious," see pp. 26-29, *supra*, and the term "corruptly" itself connotes not only a desire to keep the government in the dark, but, more specifically, an intent to obstruct an official proceeding. Moreover, this case critically differs from *Ratzlaf* in at least three additional respects. First, this case involves the distinct statutory term "corruptly," not the term "willfully," which itself has been construed to require proof of specific knowledge of unlawfulness only in cases involving tax offenses, see, *e.g.*, *Cheek* v. *United States*, 498 U.S. 192, 199-200 (1991), or other highly technical regulatory offenses, see, *e.g.*, *Ratzlaf*, 510 U.S. at 138-140; cf. *Bryan* v. *United States*, 524 U.S. 184, 191-192 (1998) (interpreting "willfully" to require general knowledge of unlawfulness). Second, it is not necessary in this case to require proof of knowledge of unlawfulness in order to avoid rendering the term "corruptly" superfluous, see *Ratzlaf*, 510 U.S. at 140-141, because the lower courts' definition of "corruptly" to require an intent to obstruct justice achieves the same result, see p. 24, *supra*. Third, it is

not necessary to require proof of knowledge of unlawfulness in order to ensure that the term "corruptly" has a consistent meaning across several related statutory provisions, see *Ratzlaf*, 510 U.S. at 142-143; in fact, such a requirement would perversely assign a *different* meaning to the term "corruptly" in Section 1512(b) than it carries in related statutes such as Sections 1503 and 1505.

Finally, to the extent that petitioner argues that its "consciousness of wrongdoing" requirement can be satisfied by anything other than knowledge of unlawfulness, petitioner cites no authority construing *any* statutory language to impose such an amorphous mens rea requirement—much less construing the term "corruptly" in that fashion. Indeed, while petitioner relies on *Ratzlaf*, it disavows (Br. 37) the specific knowledge-of-illegality formulation in that case. But, it is far from clear how petitioner's broader "consciousness of wrongdoing" requirement would differ from the intent requirement actually imposed by the district court, since the jury's determination that petitioner acted with an "improper purpose" to "subvert, undermine, or impede the fact-finding ability of an official proceeding" would seemingly compel the conclusion that petitioner acted with at least some consciousness of wrongdoing. Cf. *Aguilar*, 515 U.S. at 617 (Scalia, J., concurring in part and dissenting in part) (noting that, "in the context of obstructing jury proceedings, any claim of ignorance of wrongdoing is incredible"). And the district court's instructions did not preclude petitioner from arguing to the jury that it did not believe that its conduct was wrongful (as opposed to unlawful). See J.A. 213. Therefore, whatever petitioner's alternative "consciousness of wrongdoing" definition may mean, apart from knowledge of unlawfulness, that definition should be rejected.

C. Neither The Rule Of Lenity, The Doctrine Of Constitutional Doubt, Nor Principles Of "Fair Warning" Justify Petitioner's Construction

1. Petitioner contends (Br. 37-38) that its definition is supported by the rule of lenity. That rule, however, "applies only if, after seizing everything from which aid can be derived, * * * [this Court] can make no more than a guess as to what Congress intended." *United States* v. *Wells*, 519 U.S. 482, 499 (1997) (citations and internal quotation marks omitted). As discussed above, see pp. 17-22, *supra*, the text and history of Section 1512(b)(2), together with the definition of the term "corruptly" in other statutory contexts, make clear that Congress intended the term "corruptly" to mean "with an improper purpose": that is, "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." This case is therefore not one in which, "after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute." *United States* v. *Shabani*, 513 U.S. 10, 17 (1994). And the rule of lenity cannot justify the adoption of a construction, such as petitioner's, of which the statutory text is not susceptible. See, *e.g.*, *Salinas*, 522 U.S. at 66.

2. Petitioner also invokes (Br. 40-42) the doctrine of constitutional doubt, contending for the first time in this litigation that, under the lower courts' definition of "corruptly," the "corruptly persuades" prohibition in Section 1512(b) would present serious First Amendment overbreadth concerns. The doctrine of constitutional doubt, however, like the rule of lenity, is inapplicable here because the statute is not ambiguous. See, *e.g.*, *Miller* v. *French*, 530 U.S. 327, 341 (2000). And petitioner could not validly invoke the doctrine of constitutional doubt here in any event, because the lower courts' construction of the statute presents no significant issue of overbreadth. For the statute to be overbroad, it would have to be shown that "[the statute's]

application to protected speech [is] 'substantial,' not only in an absolute sense, but also relative to the seope of the law's plainly legitimate applications." *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003). Petitioner cannot identify *any* specific examples of constitutionally protected speech that would be criminalized under the lower courts' construction, because there is no protected First Amendment right to persuade another person to withhold testimony or withhold or alter documents with an intent to obstruct justice.[19] Accordingly, the only court of appeals to have addressed a First Amendment challenge to Section 1512(b) has summarily rejected it, see *United States* v. *Thompson*, 76 F.3d 442, 452 (2d Cir. 1996), and this Court has rejected a constitutional-doubt challenge to a similar statute, see *Aguilar*, 515 U.S. at 605-606. Because petitioner fails to identify a grave concern with First Amendment overbreadth, the constitutional-doubt doctrine is inapposite here.

3. In addition to invoking the rule of lenity, petitioner appears to make a distinct claim (Br. 38-39) that it was denied due process because it failed to receive "fair warning" that its conduct was unlawful.[20] Petitioner cannot show, however, that Section 1512(b) "fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). At the time of petitioner's conduct,

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[19] The cases on which petitioner relies (Br. 40-41 & n.40) are readily distinguishable because they involve (1) the act of petitioning the government, including the courts, see, *e.g.*, *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972); (2) conduct, such as a boycott or labor protest, that unquestionably has an expressive component, see, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 911-912 (1982); or (3) speech that criticizes judicial proceedings, see, *e.g.*, *Craig* v. *Harney*, 331 U.S. 367, 374-375 (1947).

[20] Petitioner's "fair warning" claim in this Court seemingly is not premised on the doctrine of constitutional doubt, because petitioner does not argue that *future* defendants would lack "fair warning" if the district court's definition were adopted. See, *e.g.*, Br. 39.

the term "corruptly" had long been defined, in the context of other obstruction-of-justice statutes, to require an intent to obstruct justice, see pp. 17-22, *supra*, and lower courts had held that a defendant acted "corruptly" under those statutes by destroying or withholding documents in order to interfere with a grand jury investigation, even if those documents were not yet under subpoena, see *United States* v. *Ruggiero*, 934 F.2d 440, 446 (2d Cir. 1991); *United States* v. *Gravely*, 840 F.2d 1156, 1160 (4th Cir. 1988); cf. *Wilder* v. *United States*, 143 F. 433, 442 (4th Cir. 1906), cert. denied, 204 U.S. 674 (1907) (holding that defendant cannot hide witnesses who are not yet under subpoena). And petitioner had ample notice that the term "corruptly" had the same definition in Section 1512(b) as in those other statutes, and thus that it was a criminal offense to persuade others to withhold or alter evidence in order to obstruct an impending federal investigation. See, *e.g.*, *United States* v. *Applewhaite*, 195 F.3d 679, 688 (3d Cir. 1999); *Shotts*, 145 F.3d at 1300-1301; *Thompson*, 76 F.3d at 452.[21]

All of petitioner's arguments for a narrowing construction of the term "corruptly" are predicated on the assumption that petitioner, and others similarly situated, lacked adequate warning that shredding documents in anticipation of a government investigation, with the intent of undermining

[21] Citing news reports on post-verdict interviews with jurors, petitioner contends (Br. 38-39 n.36) that it lacked fair warning because it was in fact "prosecuted for requesting edits to a draft memo": that is, for Nancy Temple's conduct in editing a draft internal memo to eliminate the (accurate) suggestion that petitioner viewed Enron's October 16 press release as "misleading." See p. 6 n.4, *supra*. Because those news reports are not in the record, see R. 1449-1452 (striking exhibits purporting to describe jurors' post-verdict statements under Federal Rule of Evidence 606(b)), petitioner's reference to them is inappropriate. Apart from those news reports, there is no reason to believe that the jury relied exclusively, or even primarily, on Temple's conduct. As petitioner itself asserted in post-trial briefing, "the government *never* suggested, either in the indictment or in its argument to the jury, that Ms. Temple's e-mail *itself* constituted an act of illegal obstruction." R. 1440.

that investigation's fact-finding mission, violated the criminal laws. But petitioner's prosecution under Section 1512 was based on a longstanding definition of "corruptly" that provides ample notice of the conduct prohibited. A party does not operate in good faith when it acts with the intent to persuade others to deprive a government investigation of evidence by shredding hoards of documents. A document retention policy that is honored mostly in the breach, and seized upon in the shadow of a government investigation for the purpose of frustrating an agency's fact-finding proceedings, cannot provide cover for that conduct. Although not every action that has the effect of temporarily or even permanently causing the loss of evidence violates Section 1512(b)(2), petitioner's frantic efforts to destroy evidence of its participation in matters that it knew were the likely target of a government investigation crossed well over the line. Petitioner had ample warning that its conduct was criminal, and the lower courts' definition of the term "corruptly" was consistent with established law.[22]

[22] If this Court were to conclude that the lower courts' definition of the term "corruptly" was erroneous, petitioner would be entitled only to a new trial, not an acquittal. Petitioner is not entitled to test the sufficiency of the evidence in the present record against any new legal standard that might be adopted. See, *e.g.*, *Lockhart* v. *Nelson*, 488 U.S. 33, 42 (1988). In any event, there was sufficient evidence in the record to support a guilty verdict under either of petitioner's alternative definitions: petitioner did persuade its employees to commit unlawful acts (*viz.*, destroying documents during a pending proceeding, in violation of 18 U.S.C. 1505), and petitioner was conscious of its wrongdoing. Petitioner's sole basis for contending (Br. 50 n.44) that an acquittal is appropriate is that a jury could not find that Nancy Temple had a "corrupt" purpose. That argument, however, rests on an erroneous interpretation of 18 U.S.C. 1515(c), see p. 33 n.15, *supra*, and petitioner does not attempt to account for the conduct of any of its other employees.

II. THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY ON THE DEFINITION OF THE PHRASE "OFFICIAL PROCEEDING"

Petitioner claims (Br. 42-47, 48-50) that, even assuming that the district court correctly defined "corruptly" as "with an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," the district court (1) should have instructed the jury that the government was required to prove that the defendant believed that some particular official proceeding was likely to occur in the near future, and (2) should not have instructed the jury that an informal agency investigation could constitute an "official proceeding." To the extent that those claims are preserved, they lack merit.

A. Petitioner's Proposed "Nexus" Requirement Should Be Rejected

Petitioner first argues (Br. 42-44) that, in order to establish liability under the "corruptly persuades" prohibition in Section 1512(b), the government should have been required to show that "the defendant believed that some particular proceeding was likely to occur in the near future." That requirement, in turn, consists of two components: (1) that the defendant believed that an official proceeding was "likely to occur," and (2) that the defendant intended to obstruct "some particular proceeding." Each of those components should be rejected.

1. In the district court, petitioner did not request an instruction that the government was required to show that petitioner believed that an official proceeding was likely to occur in the near future.[23] And in the court of appeals,

[23] Petitioner did request an instruction defining an "official proceeding" as "one that is ongoing or has been scheduled to be commenced in the future." R. 148. That instruction, however, was correctly rejected by the lower courts on the ground that it "defie[d]" the language of 18 U.S.C. 1512(e)(1) (2000), which specifies that an official proceeding "need not be pending or about to be instituted at the time of the offense." Pet. App. 26a. In passing, petitioner asserts (Br. 44 n.42) that "a defendant who clearly explains why an instruction is incorrect need not guess precisely what instruction an appellate court will ultimately adopt." Petitioner, however, fails to identify any pertinent instruction that it "clearly explain[ed]" was incorrect, but that was in fact given. And merely "[o]ffering an alternative instruction alone is not enough" to preserve harmless error review; "the district court must be fully aware of the objecting party's position." *United States* v. *Williams*, 990 F.2d 507 (9th Cir.), cert. denied, 510 U.S. 926 (1993).

petitioner did not claim that the district court should have given such an instruction. Because petitioner's claim was neither pressed nor passed upon below, it is not properly presented here. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

Even assuming, however, that petitioner's claim has been preserved for review, petitioner cannot demonstrate that the failure to give its unrequested instruction was plainly erroneous. To obtain relief under Federal Rule of Criminal Procedure 52(b), petitioner must demonstrate that there has been error that is plain and that affects substantial rights. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *United States* v. *Olano*, 507 U.S. 725, 731 (1993). Even if those conditions are met, a court may exercise its discretion to notice the error only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467.

Petitioner fails to meet this standard. First, petitioner cannot demonstrate that the failure to give its instruction is "clearly" or "obviously" erroneous under existing law. See *Olano*, 507 U.S. at 734. Petitioner cites no authority for such an instruction, and there is no basis in existing law for engrafting a requirement that the defendant believed that an official proceeding was likely to occur onto either (1) the requirement that defendant acted "corruptly," that is, with "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," or (2) the requirement that the defendant acted with the specified statutory intent to

cause another person to withhold documents from, or alter documents for, an official proceeding. Adoption of such a requirement would also be unwarranted. A defendant can possess both of the requisite intents—an intent to obstruct justice and an intent to cause another person to withhold documents from an official proceeding—even if he believes that there is only a *possibility* that his underlying misconduct will be uncovered (and thus that an official proceeding will be commenced). And the statute expressly contemplates that an official proceeding "need not be pending or about to be instituted at the time of the offense" for liability to attach. See 18 U.S.C. 1512(e)(1) (2000). The fact that Congress decided not to impose an *objective* requirement that an official proceeding must be "pending or about to be instituted" at the time of the offense strongly indicates that Congress did not intend to impose a *subjective* requirement that the defendant must have *believed* that an official proceeding was "likely to occur in the near future" at the time of the offense.[24]

[24] Petitioner heavily relies (Br. 43-44) on this Court's decision in *Aguilar*, *supra*. The "nexus" requirement imposed by this Court in *Aguilar*, however, is quite different from the mislabeled "nexus" requirement proposed by petitioner. In *Aguilar*, the Court held that, to convict a defendant under the "omnibus" clause of Section 1503, the government must show that the defendant's action would have the natural and probable effect of obstructing a judicial proceeding. See 515 U.S. at 599-600. *Aguilar*'s nexus requirement, however, did not provide that the defendant must believe that a judicial proceeding was *likely*; in the context of Section 1503, it was long settled that the defendant must know that a judicial proceeding was *ongoing*. See *Pettibone* v. *United States*, 148 U.S. 197, 207 (1893). As for the *Aguilar* nexus requirement itself: petitioner did not seek an instruction, and does not contend here, that the government was required to prove that its actions had the "natural and probable effect" of obstructing an official proceeding. One court of appeals has rejected such a "nexus" requirement in a Section 1512(b) prosecution. See *United States* v. *Gabriel*, 125 F.3d 89, 102-105 (2d Cir. 1997); but cf. *Davis*, 183 F.3d at 248 (imposing "nexus" requirement without elaboration). In any event, any failure to impose a separate "nexus" requirement in this case could not have prejudiced petitioner, because the wholesale

Second, petitioner cannot demonstrate that any error affected its substantial rights. Nothing in the district court's instructions foreclosed petitioner from arguing to the jury (1) that it believed that an official proceeding was not likely, and (2) that such a belief tended to show that it lacked an intent to obstruct justice or an intent to cause another person to withhold documents from an official proceeding. If justified by the facts, such an argument might be influential with a jury: a jury might conclude that a defendant who believes that an official proceeding is improbable would be less likely to have the improper intent to obstruct it. But the evidence here clearly demonstrated that petitioner believed that an official proceeding was likely to occur in the near future (or indeed had already begun, see pp. 47-50, *infra*) when its employees were instructed to destroy Enron-related documents. As early as October 9, Nancy Temple believed that an SEC investigation was "highly probable," and petitioner was informed of the SEC's informal investigation on October 19—before many of the most damning acts of "corrupt persuasion" took place. J.A. 93; Pet. App. 6a; Tr. 1850.[25]

2. Although petitioner did preserve its claim that the government should be required to show that the defendant

destruction of thousands of documents plainly had the "natural and probable effect" of interfering with any investigation that petitioner had the intention of obstructing.

[25] Other critical pieces of evidence demonstrating that petitioner believed that an official proceeding was likely to occur in the near future were (1) the certainty that, at a minimum, Enron would have to restate its assets to correct the $1.2 billion accounting error; (2) the strong possibility that Enron would have to restate its earnings because of its treatment of the Raptors; (3) Enron's announcement of a $1.01 billion charge to its current earnings; (4) Sherron Watkins's warnings that Enron could "implode in a wave of accounting scandals"; (5) petitioner's awareness that it had sanctioned Enron's use of highly aggressive accounting practices; (6) the rapidly declining value of Enron's stock; and (7) petitioner's probationary status with the SEC. See generally pp. 1-10, *supra* (discussing these and other pieces of evidence).

intended to obstruct "some particular proceeding," that claim lacks merit. By its terms, Section 1512(b)(2)(A) and (B) requires a defendant to have, *inter alia*, the intent to cause another person to withhold documents from, or alter documents for, "*an* official proceeding" (emphasis added), not some particular proceeding. In light of the fact that a defendant can be liable even if no proceeding is pending or about to be instituted at the time of the offense, see 18 U.S.C. 1512(e)(1) (2000), that lack of specificity is hardly surprising. By definition, when an official proceeding is not yet pending, it will be impossible for a defendant to know any specifics about that (as-yet hypothetical) proceeding; all a defendant can know is that there is a possibility (or, as here, a probability) that a specific *matter* will give rise to a proceeding in the future. Indeed, even when a proceeding is pending, the government is expressly not required to prove that the defendant was aware that the proceeding is a federal one. See 18 U.S.C. 1512(f)(1) (2000) (now codified at 18 U.S.C. 1512(g)(1) (Supp. II 2002)).

Even if an instruction that the government was required to show that the defendant intended to obstruct "some particular proceeding" was warranted, petitioner suffered no prejudice from the failure to give it. As the court of appeals noted, it was "clear at every step" "[t]hat the SEC was the feared opponent and initiator of a proceeding and not some other shadowy opponent." Pet. App. 28a. Indeed, petitioner acknowledged in the district court that "the evidence in this case suggests that the only proceeding that could have been affected is one involving the SEC." Tr. 6295. Because the government did show that petitioner intended to obstruct some particular proceeding—namely, an investigation by the SEC of petitioner's Enron-related work—any instructional

error in this regard was harmless. See *Neder* v. *United States*, 527 U.S. 1, 7-15 (1999).[26]

B. Petitioner's Challenge To The District Court's "Official Proceeding" Instruction Should Be Rejected

Finally, petitioner argues (Br. 44-47) that the district court erred by instructing the jury that an informal SEC investigation (*i.e.*, an investigation that has not been ordered by members of the Commission) could constitute an "official proceeding." That argument, too, lacks merit.

1. As an initial matter, petitioner failed to preserve that issue in the court of appeals. In its lengthy opening brief in that court, petitioner did not list the issue in its statement of issues presented for review, and mentioned the issue only in a single footnote. See Pet. C.A. Br. 70 n.24. The government therefore contended that the issue had been waived. See Gov't C.A. Br. 92 n.34. The court of appeals evidently agreed, because it declined to address the issue in its opinion. See Pet. App. 2a. Because the issue was not pressed or passed upon below, it should not be considered here. See *Williams*, 504 U.S. at 41.

2. In any event, petitioner's claim fails on the merits. Section 1515(a)(1) defines an "official proceeding" for purposes of Section 1512 as, *inter alia*, "a proceeding before a Federal Government agency which is authorized by law." Petitioner cites no authority holding that an informal SEC

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[26] Although petitioner suggests (Br. 49) that the jury may have found it guilty it based solely on its adoption of a document policy, the record belies that claim. The indictment charged petitioner only with a scheme to destroy Enron-related documents, and the government's trial evidence proved that scheme. The evidence established that petitioner used its spottily invoked document policy as a pretext for purging its files in anticipation of an SEC investigation—in violation of the policy itself. And in closing argument, the government expressly informed the jury that "there's nothing criminal about having a document policy." Tr. 6419. As the court of appeals concluded, therefore, "[t]here was no risk of conviction for innocent maintenance of a records program." Pet. App. 28a.

investigation does not qualify as an "official proceeding" under that definition. In expressly authorizing the SEC to conduct investigations, Congress treated all investigations as "proceedings." See, *e.g.*, 15 U.S.C. 78u(a) (authorizing investigations); 15 U.S.C. 78u(b) (authorizing compulsory process "[f]or the purpose of any such investigation, or any *other* proceeding under this chapter") (emphasis added). The SEC's own regulations, in turn, contemplate both formal and informal investigations. See, *e.g.*, 17 C.F.R. 202.5(a). Under the plain language of Section 1515(a)(1), therefore, an informal SEC investigation qualifies as an "official proceeding."[27]

Defining "proceeding" to include an informal SEC investigation for purposes of Section 1512 is consistent with the way in which courts have defined the parallel term "proceeding" for purposes of Section 1505. Lower courts have long considered agency investigations, even preliminary ones, to be "proceedings" under that statute. See *United States* v. *Leo*, 941 F.2d 181, 199 (3d Cir. 1991); *United States* v. *Browning, Inc.*, 572 F.2d 720, 723-724 (10th Cir.), cert. denied, 439 U.S. 822 (1978); *United States* v. *Fruchtman*, 421 F.2d 1019, 1021 (6th Cir.), cert. denied, 400 U.S. 849 (1970); *Rice* v. *United States*, 356 F.2d 709, 712-713 (8th Cir. 1966). Just as it is reasonable to give the term "corruptly" the same well-established meaning in Section 1512(b) that it had in earlier-enacted Section 1503, so too is it reasonable to give the term "proceeding" the same meaning in Section 1512 as in Section 1505. See pp. 20-22, *supra*.

Petitioner contends (Br. 46) that "the line between a simple staff investigation and a true proceeding 'before' a

[27] Petitioner's suggestion (Br. 46) that the SEC's own regulations define "proceedings" to exclude informal investigations is incorrect. The regulations on which petitioner relies are applicable only "[f]or purposes of [the SEC's] Rules of Practice," 17 C.F.R. 201.101(a), which generally govern only adjudicatory proceedings and affirmatively provide that they "do not apply" to investigations, except where specifically indicated, 17 C.F.R. 201.100(b)(1).

federal agency turns on the power to subpoena documents and compel testimony." But where an agency has subpoena power, as the SEC does, even the early stages of an investigation form part of an "official proceeding." Courts considering the meaning of the term "proceeding" in Section 1505 have not limited it to those aspects of an agency's investigation that are conducted under the authority to issue subpoenas and administer oaths. See, *e.g.*, *United States* v. *Senffner*, 280 F.3d 755, 761 (7th Cir.) (noting that "the authority to issue subpoenas and administer oaths" is sufficient to give rise to a "proceeding," but adding that "that does not mean that every aspect of the investigation must proceed under that authority"), cert. denied, 536 U.S. 934 (2002); *Browning, Inc.*, 572 F.2d at 724 (concluding that "[w]e do not see that the use of this machinery [*i.e.*, the regulatory authority to administer oaths] would have made the proceeding more like a 'proceeding' simply by virtue of the issuing of a subpoena formally or the giving notice of a preliminary investigation").[28] There is nothing talismanic about the point at which an agency's staff is formally authorized to exercise the agency's ever-present subpoena power, and none of the cases on which petitioner relies draws such a distinction. See *Senffner*, 280 F.3d at 761; *United States* v. *Kelley*, 36 F.3d 1118, 1127 (D.C. Cir. 1994); *United States* v. *Batten*, 226 F. Supp. 492, 494 (D.D.C. 1964), cert. denied, 380 U.S. 912 (1965). Under petitioner's interpretation, the coverage of Section 1512 would turn on an inquiry into an agency's own regulations concerning the use of its subpoena power. There is no reason to believe that Congress intended to require such an agency-by-agency inquiry, and petitioner's interpretation would create perverse incentives for

[28] *Frutchman*, *supra*, involved an investigation conducted by a single attorney from the Federal Trade Commission. See 421 F.2d at 1021. Regulations then in effect stated that only the Commission itself had the power to issue subpoenas. See 27 Fed. Reg. 4609, 4610 (1962).

an agency to dispense with controls on the use of its subpoena power.[29]

3. Finally, even if an informal SEC investigation does not constitute an "official proceeding" for purposes of Section 1512, any instructional error by the district court on that issue was harmless. The jury found that petitioner acted with "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," and petitioner does not contest the sufficiency of the evidence supporting that finding. See Pet. 4. Petitioner cannot seriously argue that it acted with the intent to obstruct an *informal* SEC investigation that it knew was likely or underway, but without the ultimate intent to obstruct any *formal* SEC investigation that might follow from that informal investigation. By persuading its employees to destroy thousands of documents concerning a major accounting scandal in anticipation of an SEC investigation, petitioner violated Section 1512(b)(2)(A) and (B). Its conviction should therefore be upheld.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[29] Contrary to petitioner's contention (Br. 45-46), the district court's definition of the phrase "official proceeding" does not blur the statutory distinction between obstruction of official proceedings and interference with the communication of information to law-enforcement officers. Unlike agencies such as the SEC, law-enforcement officers ordinarily do not have the power to subpoena witnesses and do not make prosecutorial decisions, and mere police investigations thus ordinarily would not qualify as "official proceedings."

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APPENDIX

1. Title 18 of the United States Code provides in pertinent part:

§ 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Shall be fined under this title or imprisoned not more than five years, or both.

§ 1512 [2000]. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is—

(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112; and

(B) in the case of an attempt, imprisonment for not more than twenty years.

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

(d) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(e) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(f) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(g) There is extraterritorial Federal jurisdiction over an offense under this section.

(h) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding

(whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(i) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

§ 1512 [2000 & Supp II 2002]. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to—

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112;

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person;

imprisonment for not more than 20 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 10 years.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever corruptly—

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[1] So in original.

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

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[1] So in original.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

§ 1515. Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section—

(1) the term "official proceeding" means—

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(B) a proceeding before the Congress;

(C) a proceeding before a Federal Government agency which is authorized by law; or

(D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

(2) the term "physical force" means physical action against another, and includes confinement;

(3) the term "misleading conduct" means—

(A) knowingly making a false statement;

(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(E) knowingly using a trick, scheme, or device with intent to mislead;

(4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant—

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

(B) serving as a probation or pretrial services officer under this title;

(5) the term "bodily injury" means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary; and

(6) the term "corruptly persuades" does not include conduct which would be misleading conduct but for a lack of a state of mind.

(b) As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

(c) This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.

§ 1519 [Supp. II 2002]. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

§ 1520 [Supp. II 2002]. Destruction of corporate audit records

(a)(1) Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies, shall maintain all audit or review workpapers for a period of 5

years from the end of the fiscal period in which the audit or review was concluded.

(2) The Securities and Exchange Commission shall promulgate, within 180 days, after adequate notice and an opportunity for comment, such rules and regulations, as are reasonably necessary, relating to the retention of relevant records such as workpapers, documents that form the basis of an audit or review, memoranda, correspondence, communications, other documents, and records (including electronic records) which are created, sent, or received in connection with an audit or review and contain conclusions, opinions, analyses, or financial data relating to such an audit or review, which is conducted by any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies. The Commission may, from time to time, amend or supplement the rules and regulations that it is required to promulgate under this section, after adequate notice and an opportunity for comment, in order to ensure that such rules and regulations adequately comport with the purposes of this section.

(b) Whoever knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), shall be fined under this title, imprisoned not more than 10 years, or both.

(c) Nothing in this section shall be deemed to diminish or relieve any person of any other duty or obligation imposed by Federal or State law or regulation to maintain, or refrain from destroying, any document.

2. Title 15 of the United States Code provides in pertinent part:

§ 78u [2000 & Supp. II 2002]. Investigations and actions

(a) Authority and discretion of Commission to investigate violations

(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(2) On request from a foreign securities authority, the Commission may provide assistance in accordance with this paragraph if the requesting authority states that the

requesting authority is conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces. The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide such assistance, the Commission shall consider whether (A) the requesting authority has agreed to provide reciprocal assistance in securities matters to the Commission; and (B) compliance with the request would prejudice the public interest of the United States.

(b) Attendance of witnesses; production of records

For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

* * * * *

3. Title 17 of the Code of Federal Regulations provides in pertinent part:

§ 202.5 Enforcement activities.

(a) Where, from complaints received from members of the public, communications from Federal or State agencies, examination of filings made with the Commission, or otherwise, it appears that there may be violation of the acts administered by the Commission or the rules or regulations thereunder, a preliminary investigation is generally made. In such preliminary investigation no process is issued or testimony compelled. The Commission may, in its discretion, make such formal investigations and authorize the use of process as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or the rules of a self-regulatory organization of which the person is a member or participant. Unless otherwise ordered by the Commission, the investigation or examination is non-public and the reports thereon are for staff and Commission use only.

* * * * *

(14)
FOR ARGUMENT

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In the Supreme Court of the United States

ARTHUR ANDERSEN LLP,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARGUMENT

I. "CORRUPTLY" REQUIRES MORE THAN AN INTENT TO IMPEDE AGENCY FACT-FINDING

A. "Corruptly" Requires Some Violation Of A Clearly Established Duty Owed To The Public

The Government contends that the definition of "corruptly" used below—"an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding"—is its usual meaning in the obstruction statutes and the criminal law generally. But it tellingly does not cite a single case, decided under any statute, that has ever used this instruction. A search of all federal cases for "subvert," "undermine," or "impede" in the same sentence as "fact-finding ability" yields only one relevant case: this one. In fact, courts and commentators have acknowledged that "corruptly" is notoriously unclear, and model instructions vary widely.[1] The Fifth Circuit's usual instruction is "knowingly and dishonestly," but the Government successfully resisted that language because it could not prove that Andersen had any dishonest intent. Pet. Br. 3.

The better reasoned decisions recognize that "corruptly" does have a core meaning—an act "'done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method'" or, stated differently, "'an act done with an intent to give some advantage inconsistent with official duty and the rights of others.'" *United States v. Aguilar*, 515 U.S. 593, 616-17 (1995) (Scalia, J., concurring and dissenting) (citations

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[1] *See, e.g., United States v. Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992); *United States v. North*, 910 F.2d 843 (D.C. Cir.), *modified on other grounds*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991); *see also* Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning Of 'Corruptly' Within The Federal Criminal Law*, 31 J. Legis. 129 (2004); Model Penal Code and Commentaries, 240.1 at 5, 8 (A.L.I. 1980) (comment) ("the requirement of 'corrupt' purpose provides virtually no guidance as to the intended scope of the law," and "use of the general term 'corruptly' should be abandoned"); Study Draft of a New Federal Criminal Code 1361 at 127 (U.S. Gov't Printing Office 1970) (comment) (same).

omitted); *see also United States v. Rooney*, 37 F.3d 847, 852 (2d Cir. 1994) ("[A] fundamental component of a 'corrupt' act is a breach of some official duty owed to the government or the public at large."); *United States v. Ogle*, 613 F.2d 233, 242 (10th Cir. 1979) ("'corruptly' ... means acting illegally or unlawfully"), *cert. denied*, 449 U.S. 825 (1980). The Government concedes those formulations are equivalent (Br. 25-26) but pretends the instructions here were consistent with that traditional meaning because they focused on the defendant's motive. But not all "purpose-based" instructions are the same. Andersen's proposal captured the traditional meaning well, by requiring unlawful means or persuasion urging the listener to "do something that they would not have had a lawful right to do." R. 146.

The Government argues (at 25) that "an individual who acts with an intent to obstruct an official proceeding necessarily seeks some advantage inconsistent with official duty and the rights of others," citing only *United States v. Reeves*, 752 F.2d 995, 1002 (5th Cir.), *cert. denied*, 474 U.S. 834 (1985). That is profoundly wrong. Some § 1503 cases have permitted a presumption that conduct intended to subvert the integrity of a *known, pending judicial proceeding*—the sort of conduct punishable as contempt—is necessarily corrupt. But those cases involved conduct that violated clearly established public duties.[2] "For the conduct covered by section 1503 such a legal presumption may well be warranted," but outside the context of a pending judicial proceeding citizens frequently "impede" the government's "fact-finding ability," within bounds recognized by the law, without violating any public duty. *North*, 910 F.2d at 882; *see also Ratzlaf v. United States*, 510 U.S. 135, 144 (1994).

Reeves made precisely that point. It explained that

[2] Thus, withholding evidence based upon a good faith assertion that it is privileged or non-responsive violates no duty and is not a crime under § 1503 even if intended to impede an official proceeding. And in *Aguilar* this Court squarely rejected the view that "*any* act, done with the intent to 'obstruct ... the due administration of justice,' is sufficient to impose criminal liability," even while a grand jury is sitting. 515 U.S. at 602.

"'[c]orruptly' ordinarily describes 'an act done *with an intent to give some advantage* inconsistent with the official duty and rights of others,'" and that "[t]he special circumstances surrounding criminal proceedings which render many acts to obstruct justice *per se* corrupt do not exist in cases involving the Internal Revenue Service." 752 F.2d at 998-99. Like the D.C. Circuit in *North*, it worried that in the agency context a rule equating "'corrupt' intent" with merely an "'improper' purpose[]" or intent to obstruct the IRS would be both unconstitutionally vague, *id.* at 999, and overbroad in violation of the First Amendment, *id.* at 1001. And it ultimately held that although the defendant probably did seek an unlawful advantage inconsistent with official duty—he tried to intimidate an IRS agent into abrogating his official duties by filing frivolous liens against the agent's home—he was nonetheless entitled to a retrial because the instructions defined "corruptly" only as "with improper motive or bad or wicked purpose." *Id.* at 1002.

The Government's argument that it seeks to harmonize the meaning of "corruptly" across the obstruction statutes is therefore not well founded. In fact it is trying to pass off a rule permitting corrupt intent to be *presumed* in the unique context of § 1503 as articulating the *meaning* of "corruptly" itself, outside of the context that justifies the presumption.[3] Andersen's instruction captures the traditional meaning, and harmonizes § 1512 with the other statutes, far better.[4]

[3] This Court has held for 100 years, for example, that "a person lacking knowledge of a pending proceeding necessarily lack[s] the evil intent to obstruct." *Aguilar*, 515 U.S. at 599. If "corruptly persuades" applies before the onset of pending proceedings then Congress *cannot* have intended to import the § 1503 presumptions. And if Congress did intend for "corruptly" in § 1512 to mean "intent to obstruct" in the § 1503 sense then Andersen "necessarily lack[ed] the evil intent to obstruct."

[4] The "improper purpose" referenced by § 1515(b) is more likely the traditional "intent to give some advantage inconsistent with official duty and the rights of others" than any intent to impede, particularly since it goes on to list wrongful *means* as examples. Although it identifies destruction of documents as a wrongful means of obstruction, it expressly limits its definition to pending proceedings when duties to preserve arise.

B. The More Traditional Meaning Of Corruptly Is The Only Sensible Interpretation Of § 1512

1. Requiring proof of conduct that involves the violation of some clearly established duty owed to the public makes vastly better sense of § 1512 than the Government's interpretation does. If Congress's goal had been to protect the "fact-finding ability" of possible future proceedings, it would have criminalized all conduct intended to make evidence unavailable. But it pointedly did not alter the traditional *Pettibone* rule that destroying documents in anticipation of a future official proceeding is not obstruction. It also made clear that merely persuading someone else to destroy a document *even for the specific purpose of ensuring that it is not available for use in a future official proceeding* is not criminal either. If "corruptly" is not superfluous then some such persuasion must be lawful. Congress even clarified that unintentionally lying for that purpose is not a crime. 18 U.S.C. § 1515(a)(6). Congress surely did not use the powerful word "corruptly" to draw an absurdly fine distinction between defendants who merely intend to make evidence unavailable to an official proceeding and those who intend (even in part) to impede its "fact-finding ability."

The Government's principal answer is that a defendant could "persuade another person to delete emails to prevent them from being disclosed simply because they contained embarrassing material." Br. 24. But that person intends to avoid embarrassment *by impeding the fact-finding ability of the proceeding*. And that defense would exonerate persons who are plainly guilty under the traditional understanding. A defendant surely cannot urge a witness to testify falsely, to destroy documents under an active grand-jury subpoena, or to bribe a juror in a pending case—and then escape sanction because his *reason* was to avoid embarrassment. *Pettibone v. United States* recognized that it was no defense to "obstructing or impeding an officer of the customs" that the "object of the party was personal chastisement." 148 U.S. 197, 205 (1893); *see also North*, 910 F.2d at 883-84 (a laudable "motive in committing the acts" is no defense to

obstruction); *id.* at 944 (Silberman, J., concurring and dissenting) (same); *Ogle*, 613 F.2d at 242 (corruptly means "acting illegally or unlawfully" and does not also require a "wicked or evil purpose" for doing so).

The Government's interpretation is also overinclusive. Conceding that the examples of plainly innocent conduct in Andersen's opening brief (at 24) would all be "corrupt" under the instructions given here, it grasps for reasons why those defendants might nonetheless escape prison. Br. 28-29. It invents a defense for defendants who do not "'withhold' any information to which the requesting party was legally entitled." Br. 28. That is inconsistent with the theory of this prosecution. The SEC staff investigating Enron in October 2001 did not have the power to demand *any* documents or testimony from Andersen. And parties are often "legally entitled" to materials erroneously withheld in good faith. It suggests that a mother who urges her son to take the Fifth does not intend to impede the fact-finding ability of a proceeding, but simply to protect her son. *Id.* That is just the "embarrassment" defense refuted above. It suggests that defendants who urge someone else not to comply with voluntary requests for documents *may* have a "natural and probable effect" defense if those materials could later be sought by subpoena. *Id.* That is completely inconsistent with its argument that an informal inquiry, without subpoena power, is still an "official proceeding." Finally, it suggests that all hypotheticals involving lawyers are solved by § 1515(c). Br. 29. But it does not explain how conduct that is "corrupt" and otherwise criminal under its interpretation can possibly be "lawful" or "bona fide" legal services. Elsewhere it says that conduct intended to impede fact-finding *cannot* be in good faith. Br. 32, 41. Nor can it explain why Congress would want to imprison ordinary citizens who engage in the same conduct with the same mental state as lawyers who go free. The fact that the Government feels a need to invent implausible technicalities for defendants like these ought to prompt a re-examination of its basic premises.

The Government's reading also criminalizes asking someone to discard a document when discarding it yourself is perfectly lawful. It responds that this anomaly was "deliberately created by Congress" when it chose to omit a pending proceeding requirement from § 1512. Br. 22. That just begs the question to be decided. Section 1512 was intended to relax the *Pettibone* rule for certain conduct that is wrongful because of its effect on witnesses, apart from the traditional concerns of obstruction law. But the instructions here destroyed any sensible distinction between witness tampering and obstruction, particularly in the corporate context. Corporations or partnerships act only through agents, and cannot implement a document retention policy if their agents cannot talk about it. The Government's interpretation of § 1512 and its theory of vicarious corporate liability led to Andersen's conviction for "persuading" itself to discard documents that it owned and had every right to discard. "Legal fiction" is charitable; this plainly is not what the Victim and Witness Protection Act had in mind.

Reading "corruptly" to require conduct that knowingly violates or induces violations of public duties resolves all of these absurdities. It would not require acquittal of defendants who intentionally obstruct justice just because their purpose was to avoid embarrassment—or to bring down the President, annoy the judge, or make money in the stock market. It would answer all of the innocent conduct hypotheticals without gymnastics: advising someone in good faith to assert a privilege, to decline a voluntary request for information, or to refrain from volunteering information would all be lawful because they do not counsel any violation of official duty. It would avoid offense to the basic values of our society by not labeling ordinary legal advice, or any other speech intended to impede governmental power within the bounds of the law, as "corrupt." And it harmonizes "corruptly persuades" with the obvious witness-protection purpose of the statute. Persuading a potential witness to violate a public duty harms them and is wrongful whether or not it makes evidence unavailable.

2. The Government offers no persuasive justification for avoiding that plainly correct interpretation. It quibbles that only verbs can be "transitive." But persuasion can be "corrupt" in nature because it "corrupts" the listener or because the speaker is "corrupt."[5] The former makes more sense in a witness tampering statute, but regardless the Government's formulation is wrong. Whether transitive or intransitive, "corruptly" requires a violation of public duty.

The Government argues that Andersen's reading "would criminalize little, if any, conduct that is not already criminalized by other provisions." Br. 31. But criminal statutes frequently provide tougher penalties for conduct that would have been criminal anyway. Every burglary is also a larceny and a trespass. Penalties for aiding and abetting or subornation of perjury are often substantially lower than for obstruction of justice, because of the higher *mens rea* obstruction requires. Nor does Andersen's interpretation impose a pending proceeding limitation on "corruptly persuades." Br. 31 n.14. Urging a witness to destroy evidence of a crime "knowing that an offense against the United States has been committed," 18 U.S.C. § 3, or to lie at a future proceeding, would be "corrupt" before proceedings begin so long as an appropriate "nexus" to the proceeding is proven. Section 1512(f)(1) is not superfluous just because, in some fact patterns, the duties that make persuasion "corrupt" will not exist until proceedings begin.

Finally, the only legislative history the Government cites for the claim that "corruptly persuades" was designed to "reach beyond cases in which the defendant used an improper means or induced an unlawful act" is Senator Biden's statement that the statute might encompass

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5 "[T]he adverbial form 'corruptly' may have either the transitive or the intransitive sense" of the verb, because it can mean either "'by means of corruption or bribery,' *i.e.*, by means of corrupting another, or acting oneself 'in a corrupt or depraved manner.'" *Poindexter*, 951 F.2d at 379 (quoting 3 Oxford English Dictionary 974 (2d ed. 1989)); *United States v. Russell*, 255 U.S. 138, 143 (1921) ("corruptly endeavor" refers to "the corruption of a juror").

"induc[ing] a witness to become unavailable to testify." Br. 34-35. But, as it points out (Br. 40), that conduct *does* violate official duty when a proceeding is pending. Senator Biden's use of the word "witness" suggests that is what he meant. And the two cases it cites as examples of witness tampering previously prosecuted under § 1503 (Br. 19) make clear that violation of a duty is necessary to make conduct "corrupt."[6]

C. The Government's Interpretation Of "Corruptly" Violates Lenity And Constitutional Doubt

1. If there were any doubt that the instructions misdefined "corruptly" in this case, it would be resolved by the rule of lenity and the doctrine of constitutional doubt. The Government's suggestion that "corruptly" *clearly and unambiguously* means nothing more than an "intent to subvert, undermine, or impede the fact-finding ability of an official proceeding," Br. 38, is directly refuted by *Reeves* and the two witness tampering cases it cites. Regardless, "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citation omitted). This Court will reject even the "most natural grammatical reading" of a statute to avoid First Amendment problems. *United States v. X-Citement Video*, 513 U.S. 64, 68-69 (1994).

The Government claims that "there is no protected First Amendment right to persuade another person to withhold testimony or withhold or alter documents with an intent to obstruct justice." Br. 39. But the phrase "intent to obstruct justice" is a term of art meaning an intent to subvert the integrity of a known, pending judicial proceeding. Even in

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[6] *See United States v. Jackson*, 607 F.2d 1219, 1221 (8th Cir. 1979) ("'[C]orruptly' means willfully, knowingly, and with the specific intent to influence a juror to abrogate his or her legal duties as a petit juror."), *cert. denied*, 444 U.S. 1080 (1980); *United States v. Howard*, 569 F.2d 1331, 1337 (5th Cir.) (holding that sale of secret grand jury transcripts to a witness was "corrupt[]" because defendant violated a duty punishable by contempt even though the court's analysis did not suggest that sales were motivated by a purpose to obstruct), *cert. denied*, 439 U.S. 834 (1978).

that context, advising someone to invoke their Fifth Amendment rights, or suggesting that they answer only the question asked, may well be constitutionally protected. In the context of agency or congressional proceedings, the Government cannot possibly be right. Union leaders who urge others not to voluntarily assist the fact-gathering of a congressional committee hostile to union interests are surely engaging in protected speech. *North*, 910 F.2d at 942 (Silberman, J., concurring and dissenting). And § 1512(b)(1) also governs truthful speech seeking to "influence" testimony, which is plainly protected unless truly "corrupt" in the sense argued by Andersen. The Government's reading criminalizes all advocacy of lawful non-cooperation with the fact-finding efforts of the political branches—which surely is substantial overbreadth. And it does not even respond to the First Amendment vagueness argument.

2. In an effort to show that Andersen had fair warning, the Government relies on distinctions it elsewhere disavows. It points to cases holding that destruction can be criminal prior to receipt of a subpoena (Br. 40) but those precedents establish that the defendant must know that there is a pending judicial proceeding *and* know that a subpoena was "likely."[7] And it resorts to rhetoric (unsupported by the record, *see infra* at 18-20) suggesting that Andersen's conduct was "corrupt" because it knew an official proceeding was "looming," "likely," or "highly probable." *E.g.*, Br. 41. But its actual position is that an abstract intent to impede an agency's fact-finding ability violates § 1512 "even if [the defendant] believes that there is only a *possibility* that ... an official proceeding will be commenced" at any point in the future. Br. 44. After defeating every instruction that would have required the jury to find that Andersen believed the

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[7] *E.g., United States v. Gravely*, 840 F.2d 1156, 1160 (4th Cir. 1988). *Aguilar* emphasized that even criminalizing false statements made to a possible witness during a pending proceeding based solely on proof of "the intent to obstruct justice" would make "culpability ... a good deal less clear from the statute than we usually require in order to impose criminal liability." 515 U.S. at 602.

proceeding was likely or that its conduct violated any law, it cannot now argue that the (alleged) imminence of a proceeding solves its obvious fair warning problems.

In addition, Andersen pointed out that it may well have been convicted solely on the basis of Nancy Temple's edits to a draft Duncan memorandum, offered in the course of providing "legal guidance." Tr. 1802. The Government's protest that we do not know the *actual* basis for the jury's verdict is beside the point. The instructions permitted conviction on that theory. The Government told the jury that Temple gave "illegal advice," R. 1415, and has insisted that her edits "figured prominently in the trial and in the government's jury addresses" and that "the jury was explicitly asked to pay particular attention to [them] as 'devastating proof'" of criminality.[8] It now apparently concedes that her conduct was not criminal, and Andersen is entitled to a new trial for that reason alone. It suggests (Br. 29 n.12) that Andersen waived the issue by failing to request a § 1515(c) instruction, but the cases it cites make clear that even if that section is (implausibly) read as an "affirmative defense" it is the kind of defense that negates an element—and thus the burden of proof remains on the Government so long as the defendant proffers evidence "tending to show that the defendant is a licensed attorney who was validly retained to perform the legal representation which constitutes the charged conduct." *United States v. Kloess*, 251 F.3d 941, 948 (11th Cir. 2001). At that point "the defendant is entitled to an acquittal unless the jury finds that the government proved beyond a reasonable doubt that the defendant's conduct did not constitute lawful, bona fide

[8] JA 215-16 & n.6. The Government incorrectly asserts that Andersen "had informed Enron that it believed that the term ['non-recurring'] was misleading" and that Temple's edits hid this fact. Br. 6 n.4. In fact, Duncan testified that he told Enron that the firm "*had not concluded* that it was misleading" but that Enron should "discuss the language with [its] counsel" because it was "problematic." Tr. 1798. Duncan's draft memo accurately stated that he advised Enron that "we had strong concerns that the presentation of the charges as non-recurring could be misconstrued" and Temple did not edit that sentence. JA 101, 99.

legal representation." *Id.* at 949.

D. Andersen Is Entitled To Acquittal

1. The Government wrongly suggests that Andersen persuaded its employees to violate their official duty because an official proceeding was already ongoing. If that were true, surely the Government would have charged Andersen under § 1505.[9] It has never otherwise argued that Andersen violated, or urged the violation of, any public duty—and thus has waived the issue.

Nor could it have established that Andersen violated any public duty. As the *Pettibone* rule reflects, citizens have no general duty to preserve documents before an official proceeding begins. Congress has, by statute, required retention of documents known to be evidence of a crime or the subject of a pending search warrant. *See* 18 U.S.C. §§ 3, 2232. Other statutes require regulated entities to retain certain records for specific periods.[10] But no such duty required Andersen to retain these documents. Congress and the SEC have *since* codified a duty for accountants to retain audit records for five years, *see* 18 U.S.C. § 1520, but even those rules—like Andersen's policy—simply require retention of work papers sufficient to allow an experienced outside auditor to understand the audit. They still do not require retention of "[s]uperseded drafts of memoranda," "[n]otes ... that reflect incomplete or preliminary thinking," and "[d]uplicates"—the very materials that Andersen was prosecuted for discarding.[11] The most the jury could have found is that David Duncan was partially motivated by an intent to impede the fact-finding ability of "possible" future proceedings by not preserving preliminary drafts and notes

[9] Even if an official proceeding against Enron was pending at the time, no violation of § 1505 was established because the jury was not required to find knowledge that a subpoena was likely. *See supra* at 9.

[10] *See, e.g.*, 29 U.S.C § 1821(d)-(e); 19 U.S.C. § 1508; 15 U.S.C. § 5409; 18 U.S.C. §§ 551, 2703(f); 21 U.S.C. §§ 335b, 350a(g); 42 U.S.C § 1485(z).

[11] Retention of Records Relevant to Audits and Review; Part IV, 68 Fed. Reg. 4862, 4863 (Jan. 30, 2003). The FBI similarly does not violate the Jencks Act, 18 U.S.C. § 3500, by destroying notes used to prepare interview memos. *United States v. Martin*, 565 F.2d 362 (5th Cir. 1978).

that could be misleading.[12] That violates no public duty.

2. Regardless, the plain meaning of "corruptly," the rule of lenity, and basic fair warning values all require that any public duty that makes conduct "corrupt" must either be an independent crime or a duty known to the defendant.[13] Violating a court order cannot be criminal contempt under 18 U.S.C. § 401, for example, unless the defendant willfully violates a clear, known duty. *See Harris v. City of Phila.*, 47 F.3d 1342, 1349-50 (3d Cir. 1995) (requiring "specific notice of the norm to which they must pattern their conduct") (collecting cases). Contempt and obstruction were once the same statute, and the original obstruction statute was

[12] The Government incorrectly asserts that Andersen "does not attempt to account for the conduct of any of its" employees other than Nancy Temple. Br. 41 n.22. Andersen explained that an acquittal is required because *none* of its employees committed or sought any breach of official duty, or believed that their behavior was wrongful. Pet. Br. 5-15. Its point in 50 n.44 was that the Government's argument that Andersen believed an official proceeding was "likely" focuses almost entirely on Nancy Temple—but her conduct cannot possibly have been "corrupt." *See* Br. 29 & n.12. The nexus issues thus independently require acquittal.

[13] That is particularly true here, where "corruptly" is modified by "knowingly." There is no "or" between "intimidation" and "threatens," and 18 U.S.C. § 1515(a)(6) would make no sense if "knowingly" did not travel all the way down the sentence to "engages in misleading conduct." The Government claims fair warning (Br. 27 & n.11) from a supposedly "prevailing view" that document destruction was improper once litigation was "deemed to be likely." Of course Andersen *did not* believe an official proceeding was likely (*infra* at 18-20) and the jury was not required to make any such finding. Regardless, there is no such consensus. *See, e.g.*, Arthur J. Schwab *et al.*, *E-Commerce Litigation*, ACLEA GLASS-CLE 205, 213 (Nov. 2000) ("It is generally accepted that the obligation to preserve relevant evidence attaches at the time the complaint is filed."). Regardless, three of its four citations rely on language from *Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988), that has been repudiated by that court. *Stevenson v. Union Pac. R.R.*, 354 F. 3d 739, 746 (8th Cir. 2004) (pre-litigation destruction will not even support an adverse spoliation inference unless done in an intentional bad faith effort to "suppress the truth"). In any event, permitting an adverse inference as a rule of evidence does not remotely imply a breach of public duty that would support criminal punishment. (Taking the Fifth would also permit an adverse inference in civil litigation, for example.)

designed to be "'declaratory of the law concerning contempts of court.'"[14] As *Pettibone* explained, 148 U.S. at 207, the presumption that ignorance of the "penal laws" is no excuse is not violated in this context, because "evil intent is lacking" if the defendant is unaware of the duty.[15] In other contexts when criminal liability is predicated on violation of duties, this Court requires them to be clearly established.[16]

The Government claims that Andersen "was conscious of its wrongdoing," but its only support is an assertion that such awareness may be presumed. Br. 37. Perhaps "in the context of obstructing [pending] jury proceedings, any claim of ignorance of wrongdoing is incredible." 515 U.S. at 617 (Scalia, J., concurring and dissenting). But hypothetical agency proceedings are well outside the historic duties imposed in the context of pending judicial proceedings. Andersen's policy required retention of all information needed to understand the audit conclusions; and no one ever proposed any effort to identify and destroy harmful

[14] *Pettibone*, 148 U.S. at 206; *Nye v. United States*, 313 U.S. 33 (1941).

[15] The Government's skepticism about how § 1512 might require conscious wrongdoing without requiring knowledge of *criminality* (Br. 37) is accordingly unfounded. The United States wrongly suggests that *Ratzlaf* required knowledge of illegality only because "absent such proof, [currency structuring] was not ... 'invariably motivated by a desire to keep the Government in the dark.'" Br. 36 (quoting 510 U.S. at 145). This Court held that knowledge of illegality was required because structuring was not "inevitably nefarious" *even if* the defendant's specific intent was to "'depriv[e] the Government of the information that [the reporting statute] is designed to obtain.'" 510 U.S. at 144 (citation omitted).

[16] *See, e.g.*, *McNally v. United States*, 483 U.S. 350, 355, 359-60 (1987) (mail fraud conviction cannot be based on alleged duty to render "honest and impartial government" absent clear statement by Congress). The fact that an Andersen executive once characterized Duncan's conduct as a "failure of judgment," GX 2002K, *cited in* Br. 26, hardly establishes that Duncan had fair warning that he was violating a public duty. As this Court recognized in *Dirks v. SEC*, 463 U.S. 646, 661 n.21, 665 (1983), there are "'significant distinctions between actual legal obligations and ethical ideals.'" (Citation omitted); *see also Chiarella v. United States*, 445 U.S. 222, 232-33 (1980) (holding that Congress had not clearly criminalized conduct, although defendant was fired when allegations came to light).

information, or to mislead the SEC.[17] The jury's finding that *part* of someone's motivation was to "impede the fact-finding ability" of possible proceedings does not make "incredible" the consistent testimony that they sincerely believed it was proper to comply with the policy.[18] Yet the instructions affirmatively told the jurors that they could not consider Andersen's proof that it "honestly and sincerely believed that its conduct was lawful." JA 213; *see North*, 910 F.2d at 943-44 (Silberman, J., concurring and dissenting)

[17] The policy called for "all information related to the engagement," and "[i]nformation having relevance to our opinion or findings" to be retained. JA 45, 47. Temple accordingly ensured retention of documents that *undermined* the audit (Pet. Br. 8-9; Tr. 2440-41; GX NT1009), and others deleted only "extraneous" documents, focusing on "inclusion rather than exclusion." Pet. Br. 12 n.16, 13; JA 164-67; Tr. 2069-70, 3369. The fact that some members of the Houston team were behind in compiling the Enron work papers does not remotely establish that Andersen's retention policy was "dormant." Some team members were already in compliance (Tr. 5138-39, 5170, 5178), others knew they should be (Tr. 3339), many witnesses testified that compliance was the norm (Tr. 898-904, 3335-36, 3391-93, 4715-18, 5000, 5240-42), and compliance reminders unrelated to Enron were sent in April and August of 2001 (DX 504; DX 509; Tr. 5799-806, 2577). Nor does the volume of documents discarded imply conscious wrongdoing. The Houston team sent only an average of one half box per person to the shredder between October 24 and 26 (Tr. 2182-84, 3996) and nothing of magnitude after that date. Tr. 3989.

[18] The Government asserts that the policy plainly prohibited destruction when litigation was "deemed to be likely." Br. 27, 47 n.26. That language is not found in the retention policy, but in a related policy (Br. 4-5) that only requires "notification" to the legal group of "[a]ny situation that may result in a claim," JA 40, including when litigation is "judged likely." JA 29. The retention policy, in contrast, states that it is triggered only by "threatened litigation," which is described in the notification policy as "notification from [potential plaintiffs] threatening legal action." Pet. Br. 10 n.14; JA 40. Although the Government asserts that a Portland partner "refused to comply" with a request from Houston to follow the policy (Br. 8), the office took no action because Portland's Enron files already conformed to the policy. Tr. 5170, 5178. Inexplicably, even though one partner testified that he did not recall the compliance request or his reaction to it (Tr. 5194-97), the Government says he "explained his reaction" by saying "[f]or God's sake, just don't" destroy documents. Br. 8. In fact, that comment was merely a response to a question about his view of the policy. Tr. 5210.

(when means of obstruction are not "independently criminal" instructions must permit jury to consider whether the defendant "believed that the nature of his [document destruction]" was "in accordance with the law").

3. The Government nevertheless suggests, for the first time, that it should get a second chance to meet its burden under "any new legal standard that might be adopted." Br. 41 n.22. That would violate the Double Jeopardy Clause. *See Burks v. United States*, 437 U.S. 1, 18 (1978) (double jeopardy "precludes a second trial once the reviewing court has found the evidence legally insufficient").[19] This Court has consistently indicated that acquittal is required if the evidence was insufficient under a correct understanding of the law.[20] Regardless the Government was informed of Andersen's interpretation before trial (R. 144-46, 429-40, 941-45, 1160-61), and the law certainly was not settled in its favor, in the Fifth Circuit or generally. It thus had every incentive to introduce evidence of violations of duty or consciousness of wrongdoing if it had any. Even now it has not identified any evidence that it wishes it had introduced.

II. THE NEXUS AND OFFICIAL PROCEEDING INSTRUCTIONS REQUIRE REVERSAL

A. Informal Inquiries Are Not Official Proceedings

The Government claims that Andersen waived any challenge to the definition of "official proceeding" by initially presenting its argument to the Fifth Circuit in a footnote. Br. 47. But the 200-word footnote, citing numerous authorities, was impossible to miss; the Government responded on the merits; and Andersen returned to the issue in the text of its reply. JA 221-26. After questioning

[19] *Lockhart v. Nelson*, 488 U.S. 33, 40-41 (1988), held only that whether a new trial is permissible after reversal based on a classic "trial error"—improper admission of evidence—is determined by reference to "all of the evidence *admitted by the trial court*." It does not permit a new trial where the evidence admitted below was insufficient as a matter of law.

[20] *See, e.g., United States v. Kozminski*, 487 U.S. 931, 953 (1988); *United States v. Staples*, 30 F.3d 108, 109 (10th Cir. 1994) (evidence insufficient under new standard after remand from this Court); *Aguilar*, 515 U.S. at 533 (affirming judgment of acquittal under new standard).

the Government on the merits of the issue at argument, the Fifth Circuit necessarily resolved the issue in Andersen's favor when it found that "[p]ossible proceedings" did not become a "reality" until November 8. Pet. App. 5a.

The Government asserts that *everything* an agency does is an "official proceeding" as long as an agency has subpoena power. Br. 49-50. That strips "official proceeding" of any limiting force and renders the term synonymous with "matter[s] within the jurisdiction of" the agency. Pet. Br. 45. The informal inquiry here began when an SEC staff employee read an article in the Wall Street Journal that concerned conflicts of interest at Enron (not GAAP violations) (Tr. 656), which prompted him to "complete a form," and make an entry in "the SEC's internal computer system." Tr. 659. He then reviewed Enron's filings, browsed the Internet, and "checked out the chat rooms." Tr. 665-66. As *United States v. Batten* explained, an official proceeding must be "more than a mere police investigation." 226 F. Supp. 492, 494 (D.D.C. 1964), *cert. denied*, 380 U.S. 912 (1965). It surely must be more than surfing the web and visiting chat rooms. And while not "'every aspect of the investigation must proceed under'" the authority to issue subpoenas or administer oaths (Br. 49 (citation omitted)), § 1512(b) is not triggered until at least *some aspect* carries that authority. The SEC staff never has subpoena power until the Commission votes to initiate a formal investigation.

The statutes and regulations cited by the Government confirm this view. 15 U.S.C. § 78u(a)(1) does not treat "all investigations as 'proceedings.'" Br. 48. It speaks to formal investigations initiated by a vote of the Commission, and is silent as to the informal inquiries made by the staff. And § 78u(b)'s reference to "investigation, or any other proceeding" merely suggests what 17 C.F.R. § 201.101(a)(9) makes explicit—that an investigation initiated by a vote of the Commission is a "proceeding," but an informal staff investigation is not.[21] Although the Government previously

[21] In every case cited by the Government, the "proceeding" had been given the power to issue subpoenas or administer oaths. *See* Pet. Rep. 3 n.2. Its assertion that the investigator in *United States v. Fruchtman*, 421 F.2d 1019 (6th Cir.), *cert. denied*, 400 U.S. 849 (1970), did not have that power (Br. 49 n.28), is inaccurate. The FTC at the time expressly delegated investigative authority to staff members, who could administer oaths. 27 Fed. Reg. 4607, 4610 § 1.32 (May 16, 1962); Pet. Rep. 4 n.2.

conceded that SEC regulations exclude informal inquiries from its definition of a "proceeding" (Opp. 29 n.20), it now asserts that this definition only applies to adjudicative proceedings. But § 201.100(b)(1) merely states that investigations need not comply with the elaborate procedures set out for adjudications. The mere fact that the *prescriptive* rules do not apply to investigations does not mean that the *descriptive* definition of a "proceeding" sheds no light on the meaning of that term in the context of investigations. To the contrary, § 201.101(a)(9)'s definition of "proceeding" fully conforms to the use of that word in the regulations governing investigations in Parts 202 and 203. They use "proceeding" to refer to investigations initiated by a vote of the Commission, and consistently refrain from using that word to describe informal inquiries initiated by the staff.[22] And thus the SEC's own letter of October 17, 2001 only advised Enron that it was conducting a voluntary "inquiry"—not a "proceeding." JA 103-06.

B. The Jury Was Not Required To Find Nexus

1. The Government suggests (Br. 42) that Andersen waived the nexus issue by failing to request an instruction phrased in terms of whether it believed an official proceeding was "likely." Andersen proposed "ongoing or ... scheduled to be commenced" and "particular" because those were the formulations supported by Fifth Circuit law at the time. But it also clearly objected to the instruction given on

[22] Part 203 Subpart B, which governs investigations "pursuant to a Commission order" is captioned "Formal Investigative Proceedings," and § 203.4(a) defines "formal investigative proceeding" as "a proceeding pursuant to a Commission order for investigation or examination." The section authorizing staff inquiries (in which "no process is issued or testimony compelled") is captioned "Enforcement *activities*." 17 C.F.R. § 202.5 (emphasis added); *see also id.* (conferring the authority for preliminary investigations, and never using the word "proceeding").

the ground that it required "insufficient nexus" to an official proceeding, citing *Aguilar*. R. 424-25, 931, 938. And the Fifth Circuit recognized that Andersen's appeal properly raised the issue of "the concreteness of the defendant's expectation of a proceeding." Pet. App. 26a.

Aguilar required proof of a nexus between the defendant's conduct and an actual official proceeding. Otherwise Judge Aguilar might have been convicted merely for lying to investigating FBI agents—which, although criminal, is not obstruction. 515 U.S. at 599-601. Although § 1512 does not require a pending proceeding, it does preserve the traditional distinction between obstructing an "official proceeding" and mere interference with preliminary investigations. As in *Pettibone* and *Aguilar*, Andersen could not have known that its conduct would have the natural and probable effect of obstructing an official proceeding *at least* until it knew that proceeding was probable.

2. The Government does not even argue that the incorrect nexus instructions were harmless beyond a reasonable doubt (the correct standard), but suggests that they did not affect Andersen's "substantial rights" because Andersen knew an official proceeding was likely or imminent.[23] Again it strategically blurs the distinction between the informal inquiry and an actual "official proceeding." Although Andersen learned of the informal inquiry on October 17, the SEC's letter concerned allegations that Enron inadequately disclosed conflicts of interest with its CFO—not allegations of GAAP violations that would directly implicate Andersen's audits. Tr. 656-57; GX 1017B; GX 1019C, D. In addition, Andersen was told at the time that the SEC was only planning to send Enron an "accounting letter," which in its experience never involved a request for auditor documents.[24] The fact that Andersen

[23] The Government's suggestion (at 43) that plain error review applies "assuming ... petitioner's claim has been preserved," must be a mistake. In any event, *Pettibone* and *Aguilar* made the error plain.

[24] Tr. 5888, 1854, 1857, 1449; GX NT1023 (contemporaneous Temple notes stating that the "accounting letter" not received yet); GX 1025B.

may have anticipated "SEC document requests" directed at Enron, or that Temple *may* have thought some "SEC investigation" "'highly probable,'" Br. 3-4, 45, is irrelevant.

Instead, the undisputed facts establish that Andersen *correctly understood* that the SEC would not open an "official proceeding" seeking access to *Andersen's* files unless Enron restated its earnings.[25] There is no dispute that Andersen resolved the Raptors impairment issue which was the only earnings restatement issue on the horizon prior to October 27. On that date, Enron informed Andersen that there were possible problems with Chewco. Tr. 1934-35. Andersen only discovered the Chewco fraud that triggered the restatement and the SEC subpoena in November. *Id.*. Before then, Andersen accurately perceived that an earnings restatement (and subsequent subpoena) was no more than a "reasonable possibility."[26] Although the

The SEC sends thousands of such requests per year and less than one percent ever lead to any investigation, let alone a formal one. Tr. 5877-78, 5889; *see also* Tr. 410, 421 (SEC witness testifies that such letters "might" lead to investigation if answer is unsatisfactory).

[25] The Government (at 4 n.2) seeks to discredit John Riley's testimony that only an earnings restatement would prompt an SEC request to an auditor even though his view was based on a decade of experience working at the SEC (Tr. 5875) and his expectation proved to be *accurate*. Enron announced on October 16 that it was "reducing its outstanding shareholder equity by approximately $1.2 billion," and yet the SEC did not seek anything from Andersen until Enron announced an earnings restatement on November 8. Br. 6-10; Tr. 568, 763-64. Nor did the Government proffer any contradictory testimony. Thomas Newkirk, one of its SEC witnesses, did not "testif[y] that *any* restatement ... would result in a formal SEC investigation." Br. 4 n.2. He only discussed earnings restatements (Tr. 415, 424; Pet. App. 11a) and acknowledged that the Waste Management and Sunbeam subpoenas to Andersen were both prompted by earnings restatements. Tr. 450, 467. None of Temple's extensive notes suggest she knew about the balance sheet issue at the time of her alleged acts, and Duncan testified that he only knew that error "might or not" require a restatement as of the relevant date. Tr. 2615.

[26] Pet. Br. 11 n.15. This explains why counsel was retained to provide advice on "*possible* litigation" (Tr. 4183) and why Temple designated the matter as a "*potential*" regulatory investigation. Pet. Br. 11. The Government nevertheless relies on undated Temple notes to suggest that she believed all along that the SEC would subpoena Andersen records

Government does not challenge Andersen's showing that all of the alleged acts of "corrupt persuasion" occurred no later than October 26 (Pet. Br. 4 & n.5) it nonetheless relies on a series of events that occurred *after October 26* to suggest knowledge of a probable proceeding. *Compare* Br. 8-9 ("from October 19") *with* JA 120-21, 122-24; Tr. 1934, 4591, 4605, 5601-02, 5919-20 (events after October 26). It even cites Andersen's "recei[pt of] a subpoena for Enron-related documents" (Br. 9) without disclosing that the subpoena was served on November 6. Tr. 3066, 5157; GX 1106A. There is no evidence refuting its own cooperating witness's emphatic testimony that he and his colleagues only viewed a proceeding as "possible" during the relevant time. This Court acquitted Judge Aguilar because the evidence showed only that he knew his conduct "might or might not" obstruct a proceeding. 515 U.S. at 600. The same is true here.

As a fallback, the Government suggests that the instructions allowed Andersen to argue that it lacked criminal intent because it did not believe an official proceeding was likely. But the jury was told that an official proceeding was *already ongoing*, and that the prosecution "need only prove" an intent to impede some "regulatory proceeding or investigation whether or not that proceeding had begun or whether or not a subpoena had been served." JA 213. The instructions left no room for a nexus defense.

CONCLUSION

The conviction must be reversed and remanded with instructions to enter a judgment of acquittal or a new trial.

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prior to a restatement. Br. 4 n.2. Those notes, however, were obviously written in November, as they reference the contents of Enron's restatement. GX NT-Undated, at A-004609. And undisputed testimony showed that Andersen did not receive any request for documents from the SEC until after Waste Management restated its earnings. Tr. 466-67. The Government also tries to impute knowledge of a future subpoena based on Sherron Watkins's statement that Enron could "implode in a wave of accounting scandals." Br. 2. During the relevant period, however, Duncan and his colleagues understood that her allegations had already been discredited by an investigation conducted by Vinson & Elkins. *See, e.g.*, Tr. 2333, 2373-76, 2419; GX 1015D.

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APPENDIX

1. Title 17, Section 201 of the Code of Federal Regulations provides in pertinent part:

§ 201.100 Scope of the rules of practice.

(a) Unless provided otherwise, these Rules of Practice govern proceedings before the Commission under the statutes that it administers.

(b) These rules do not apply to:

(1) Investigations, except where made specifically applicable by the Rules Relating to Investigations, part 203 of this chapter

* * *

§ 201.101 Definitions.

(a) For purposes of these Rules of Practice, unless explicitly stated to the contrary:

* * *

(7) Order instituting proceedings means an order issued by the Commission commencing a proceeding or an order issued by the Commission to hold a hearing;

* * *

(9) Proceeding means any agency process initiated:

(i) By an order instituting proceedings; ...

* * *

2. Title 17, Section 202 of the Code of Federal Regulations provides in pertinent part:

§ 202.5 Enforcement activities.

(a) Where, from complaints received from members of the public, communications from Federal or State agencies, examination of filings made with the Commission, or otherwise, it appears that there may be violation of the acts administered by the Commission or the rules or regulations thereunder, a preliminary investigation is generally made. In such preliminary investigation no process is issued or testimony compelled. The Commission may, in its discretion, make such formal investigations and authorize the use of process as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws or the rules of a self-regulatory organization of which the person is a member or participant. Unless otherwise ordered by the Commission, the investigation or examination is non-public and the reports thereon are for staff and Commission use only.

(b) After investigation or otherwise the Commission may in its discretion take one or more of the following actions: Institution of administrative proceedings looking to the imposition of remedial sanctions, initiation of injunctive proceedings in the courts, and, in the case of a willful violation, reference of the matter to the Department of Justice for criminal prosecution. ...

* * *

3. Title 17, Section 203 of the Code of Federal Regulations provides in pertinent part:

§ 203.4 Applicability of §§ 203.4 through 203.8.

(a) Sections 203.4 through 203.8 shall be applicable to a witness who is sworn in a proceeding pursuant to a Commission order for investigation or examination, such proceeding being hereinafter referred to as a formal investigative proceeding.

(b) Formal investigative proceedings may be held before the Commission, before one or more of its members, or before any officer designated by it for the purpose of taking testimony of witnesses and received other evidence. The term officer conducting the investigation shall mean any of the foregoing.

(8)

No. 04-368

IN THE

Supreme Court of the United States

ARTHUR ANDERSEN LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE

The American Institute of Certified Public Accountants ("AICPA" or "Institute") is the national organization of the certified public accounting profession, all of whose more than 340,000 members are certified public accountants ("CPAs"). The AICPA's service to the public spans more than one hundred years and extends to certified public accountants in academia, government and business as well as those who provide accounting services through firms of all sizes, and as solo practitioners.

Among the AICPA's purposes are the promotion and maintenance of high professional standards of practice. In pursuit of these ends, the AICPA has been a principal force in developing accounting and auditing standards, drafting model legislation, sponsoring educational programs, and issuing professional publications to improve the quality of services provided by CPAs to their clients and the public. As part of the Institute's role in providing guidance and leadership on issues relevant to the profession, the Institute frequently files *amicus* briefs in connection with matters that impact the scope and bases of liability sought to be imposed upon its CPA members. The AICPA has appeared previously as *amicus curiae* before this Court on a variety of such issues.[1]

It is because of its commitment to the public interest and the profession that the Institute believes that, among other things, this Court should provide appropriate clarification

1. Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* state that no counsel for a party authored any part of this brief, and no person or entity other than *amicus* and their counsel made a monetary contribution to the preparation or submission of this brief.

of the term "corruptly persuades" as contained in federal criminal statutes such as that at issue here. As discussed below, businesses of all types and sizes, but particularly those in the learned professions, will be forced to act at their peril in making what had been routine business decisions, such as those related to document retention policies. At a minimum, the Fifth Circuit's decision violated the rule of lenity. Failure to apply this rule to an ambiguous criminal statute can have dramatic and unintended consequences that harm businesses, the profession and, ultimately, the public.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the case below, Arthur Andersen & Co. ("Andersen") was convicted by a federal jury sitting in Southern District of Texas of "witness tampering" in violation of 18 U.S.C. § 1512(b). The government charged Andersen based on instructions given by senior Andersen officials, including an in-house Andersen lawyer, to members of their audit engagement team working on the Enron audit to comply with Andersen's document retention policy. This instruction occurred prior to Andersen's receipt of a subpoena from the Securities and Exchange Commission ("SEC").

At trial, the government requested, and the court gave to the jury, an instruction that the term "corruptly persuades" contained in 18 U.S.C. § 1512(b) means persuasion motivated by an "improper purpose" to "subvert, undermine, or impede the fact-finding ability of an official proceeding" even if "Andersen *honestly and sincerely believed that its conduct was lawful*." (Brief of Arthur Andersen at 3 (citing to Appendix filed with the Petition for Certification at 48a, 49a) (emphasis added).) On appeal, the Fifth Circuit affirmed the conviction, finding that this aspect of the jury instruction

was proper. *United States v. Arthur Andersen LLP*, 374 F.3d 281 (5th Cir. 2004).

There is an acknowledged conflict among the Courts of Appeals regarding the meaning of "corruptly persuades" under Section 1512(b). Some circuits, including the Fifth Circuit, have held that it requires nothing more than persuasion with an improper purpose. We submit, however, that the better reasoned decisions, including those from the D.C. Circuit and Third Circuit, have stated that equating "corrupt" persuasion with persuasion merely for an improper purpose is impermissibly vague and renders the "corruption" element superfluous.

Additionally, the court below improperly instructed the jury concerning another important element of Section 1512(b)—namely, what constitutes an "official proceeding." While the statute states that a proceeding "need not be pending or about to be instituted at the time of the offense," the jury instruction provided a gloss on the statute that essentially broadened "official proceeding" to encompass any aspect of an agency's "fact-finding," whether there is an "official proceeding" at all, or even an expectation of one. Yet there is no support in the statute's language, legislative history or otherwise for this interpretation. And in fact this interpretation is contrary to this Court's prior authority on analogous statutes.

At a minimum, application of the rule of lenity required that the court below interpret this vague criminal statute narrowly so that those subject to the statute can have adequate and clear notice as to what will constitute illegal conduct under the statute. The failure to apply lenity under such circumstances can result in tragic, unintended consequences,

such as the complete dismantling of a national accounting firm like occurred here.

Criminal statutes affecting the accounting profession are multiplying. It is important that these statutes are interpreted in a fair and careful manner. This is particularly the case when the statutes may touch upon the kinds of instructions and business decisions that accounting firms and others in the profession grapple with daily. Dealing with these issues is always difficult; the additional ambiguity now imbued into these decisions by the Fifth Circuit's holding, however, creates even more fear, burden and distraction in an environment where risk-management concerns are already detrimentally affecting the accounting profession, and, ultimately, the public.

For these reasons, and those addressed in more detail below, we urge the Court to reverse the decision of the Fifth Circuit Court of Appeals below.

ARGUMENT

I. The Jury Instruction Upheld By The Fifth Circuit Was Based On Erroneous Interpretation Of Section 1512.

A. The Fifth Circuit Improperly Interpreted "Corruptly Persuades" as Used in Section 1512(b).

The statute at issue here is 18 U.S.C. § 1512(b). Section 1512(b) stated at the time that

> [w]hoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . cause or induce any person to . . . alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than ten years, or both.

It is the Fifth Circuit's instruction of the meaning of "corruptly persuades" that is at the heart of this appeal.

Specifically, the jury was instructed that the phrase "corruptly persuade" meant an improper purpose to induce another person to engage in certain conduct. "An improper purpose, *for this case*, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." *United States v. Arthur Andersen LLP*, 374 F.3d 281, 293 (5th Cir 2004) (emphasis in original). Andersen requested, but the court declined to include in the charge, an instruction that corrupt persuasion be found only where there was use of an improper method or violation of an independent legal duty. Conversely, the government requested, and the court included in the charge, the instruction that Andersen could be found guilty even if "Andersen honestly and sincerely believed that its conduct was lawful." (Arthur Andersen Brief at 3.)

Courts have recognized that in the context of Section 1512(b), as well as that of the other federal obstruction of justice statutes, "corruptly" can be given either a transitive or intransitive meaning. *See, e.g., United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991). Under the transitive definition, "corruptly" requires persuasion by means of corruption or bribery, while under the intransitive definition, "corruptly" only requires that the person act corruptly or in

a corrupt or depraved manner. *Id.* at 379 (citing to 3 Oxford English Dictionary 974 (2d ed. 1989)). Andersen requested that "corruptly" be given the transitive meaning so as to require a finding that the persuader had actually utilized improper means to persuade. The government urged, and the court chose, however, the intransitive meaning, requiring only that the person act corruptly, in this case defined as "for an improper purpose."

We submit that the better-reasoned decisions have properly found "corrupt persuasion" to require more than "an improper purpose." In *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997), for example, Farrell was convicted of attempting to corruptly persuade a witness to withhold testimony from a Department of Agriculture agent. The court held that "[w]ithout any definitional assistance, we find the phrase 'corruptly persuades' to be ambiguous," and agreed that it could not simply mean an intent to hinder communication with law enforcement, because such an interpretation would render "corruptly persuades" in the statute superfluous. *Id.* at 487. The court specifically rejected using 18 U.S.C.§ 1503[2] as a basis for interpreting corrupt persuasion in Section 1512 because the two statutes were not sufficiently analogous. *Id.* at 490. The court correctly recognized that "corruptly" in the context of Section 1503 can reasonably be defined as for an improper purpose because such a definition provides the *mens rea* element of Section 1503. *Id.* at 490. Section 1512, however, in contrast, already contains a *mens rea* requirement, since the statute requires "knowing" conduct. Thus, the court found that applying the

2. "Whoever corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished." 18 U.S.C. § 1503 (West 2004).

"improper purpose" definition from Section 1503 to Section 1512 renders corruptly persuades in Section 1512 superfluous.

The court in *United States v. Davis*, 183 F.3d 231, 250 n.6 (3d Cir. 1999), agreed with this approach, and found in its review of a jury instruction — similar to the one at issue here — that equating "corruptly persuades" with an improper purpose was insufficient, and required clarification on remand. The court cited its approval of *Poindexter*, and agreed that the core of Section 1512(b)'s prohibition of corrupt persuasion was directed at a person who, for "purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty." *Id.* at 249 (quoting *Poindexter*, 951 F.2d at 385). Again, the court correctly recognized that the transitive meaning of "corruptly" was the most appropriate definition, as the intransitive meaning provides insufficient guidance as to what conduct will be considered criminal.[3]

Assigning a transitive meaning, moreover, comports with the indisputable purpose of the statute. Section 1512 is a "witness tampering statute," typically used to punish obviously illegal and morally reprehensible conduct such as killing, attempting to kill, or harming a witness, or using other clearly improper forms of violent and coercive intimidation, like bribery. *See* S. Rep. No. 97-532, at 3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2521 (1982); *see also* 134 Cong.

3. Another factor in favor of a transitive definition of "corruptly" is the fact that the other terms contained in Section 1512(b) are transitive as well. As discussed in more detail in petitioner's brief, "use intimidation," or "threatens" both go to the defendant's conduct and not to the purpose of the conduct. Therefore, the principal of *ejusdem generic* requires a transitive interpretation.

Rec. S17,360-02 (daily ed. Nov. 10, 1988) (noting that amendment of Section 1512 to include "corruptly persuades" was intended to address bribing a witness to give false testimony). In sum, the proper interpretation of "corruptly persuades" requires an improper means of persuasion, inducement to perform an illegal act, or at least consciousness of wrongdoing in attempting to influence a witness.

The jury instruction concerning "corruptly persuades" was also erroneous in essentially extending Section 1512(b) to cover any "intent to impede the fact finding ability of an official proceeding." *Anderson*, 374 F.3d at 295. Not only does such language exist *nowhere* in the statute itself, but is contrary to a fundamental tenet of this country's legal system. As discussed in petitioner's brief, and in this brief *infra*, practically any decision made by a subject of a governmental proceeding can have the effect (in the government's view, at least) of "impeding" that proceeding, and is therefore criminalized by the Fifth Circuit's instruction. Yet the adversarial nature of our legal system not only permits such conduct but encourages it. Consider, for example, protections provided by the First Amendment and the Fifth Amendment, which, respectively, allow one to speak against the government, or to not speak at all. Yet both actions arguably "impede" fact-finding of a governmental agency.

Indeed, lawyers are required to provide zealous representation of their clients. There are, no doubt, limitations on such representation in connection with governmental proceedings—hence, the presence obstruction of justice statutes. But, importantly, these statutes, as well as decisions interpreting them, have recognized this tension, and have therefore sought explicitly to strike the proper balance. Thus,

for example, 18 U.S.C. § 1505[4] requires that a proceeding be pending. And case law interpreting 18 U.S.C. § 1505 has defined "corruptly" to require an act done to bring about an unlawful result, or a lawful result by some method that the defendant knew or thought was unlawful. *See, e.g., United States v. North*, 910 F.2d 843, 942-43 (D.C. Cir. 1990) (Siberman, J., concurring in part and dissenting in part).

Courts in the Second and Eleventh circuits, as well as the Fifth Circuit in the case below, in contrast, have ignored these concerns, and instead have interpreted "corruptly persuades" far more broadly, despite a recognition that the language at issue was not without ambiguity. In *United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996), the court relied almost exclusively on cases interpreting Section 1503 to find Section 1512(b) "not impermissibly vague" when defining corrupt persuasion to mean motivated by an improper purpose. *Id.* at 452. The Eleventh Circuit, in *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998), following *Thompson*, declined to extend the rationale of *Poindexter* to Section 1512 because it viewed Section 1505 as not sufficiently similar to Section 1512. *Id.* at 1300. While the court believed that "corruptly persuades" is defined analogously in Section 1503, in fact the court failed to recognize the differences between these two sections. *Id.* As previously discussed, that "corruptly" in the context of Section 1503 may be clearly and properly defined to mean for an improper purpose is of no direct consequence in interpreting Section 1512(b), as Section 1512(b) contains a specific *mens rea* requirement whereas Section 1503 does not.

4. "Whoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . . shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 1505 (West 2004).

In evaluating Andersen's objection to the jury instruction, the Fifth Circuit rejected Andersen's argument that defining "corruptly persuades" to mean an improper purpose renders the term superfluous. More particularly, the Fifth Circuit found that defining "corruptly persuades" to mean an "intent to subvert, undermine, or impede the fact-finding ability of an official proceeding" was not duplicative of the statute's subsequent reference to the "intent to impair the object's integrity or availability for use in an official proceeding," because the intent to impair the availability of documents for an official proceeding makes no reference to the "fact-finding" ability of the official proceeding. The Fifth Circuit also consulted the legislative history of Section 1512(b) both as it was officially enacted, and then subsequently amended in 1988 to include the corrupt persuasion element, and found that "defining 'corruptly' as 'motivated by an improper purpose' comports easily with the legislative history." *Anderson*, 374 F.3d at 296.

To the contrary, however, as discussed above, use of the *intransitive* meaning of "corruptly" in the context of Section 1512(b) renders the term "corruptly persuades" superfluous. If "corruptly persuades" is defined, as suggested by the Fifth Circuit, to "impede the fact-finding ability of an official proceeding," there would be no need for the additional language present in the statute, which already prohibits a person from inducing another to make a document unavailable in an official proceeding. If making a document unavailable in an official proceeding is not impeding the fact-finding ability of the official proceeding, then what effect does making the document unavailable have? In short, as the more well-reasoned decisions acknowledge, such an interpretation of corrupt persuasion is circular. As the court below even noted, this interpretation casts only a "dim light"

on "corruptly" as contained in Section 1512(b). *Andersen*, 374 F.3d at 294.

In fact, many courts addressing "corruptly persuades" under Section 1512(b) have acknowledged that the language contained in the statute is ambiguous. *See, e.g., Farrell*, 126 F.3d at 487 ("[W]e find the phrase 'corruptly persuades' to be ambiguous."); *Davis*, 183 F.3d at 250 n.6 (finding that a jury instruction equating corrupt persuasion to improper purpose provided "insufficient guidance."); *Poindexter*, 951 F.2d at 378 ("We must acknowledge that, on its face, the word "corruptly" is vague."). Those courts that have not specifically stated that "corruptly persuade[s]" is vague have at least acknowledged that the term may be given more than one meaning." *Shotts*, 145 F.3d at 1300-01 (discussing *Poindexter* and *Farrell*); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (referring to Section 1503, and addressing that section to interpret Section 1512).

In *United States v. Poindexter*, the court evaluated "corruptly persuades" in the context of Section 1505, which specifically governs obstruction of justice in the context of congressional committee hearings. Looking to both the transitive and intransitive meaning of the term "corruptly," the court found the term unconstitutionally vague under both uses without "some narrowing gloss," the absence of which would require people to guess at its meaning. 951 F.2d at 378. Finding the plain meaning failed to provide sufficient definiteness, the court consulted the legislative history. *Id.* The court stated that statements made by members of the Judiciary Committee in 1982, at the time of the passage of the Victim and Witness Protection Act of 1982, and the addition of Section 1512 strongly suggested that in the context of Sections 1503 and 1505, "'corruption' is

something more specific than simply 'any immoral method used to influence a proceeding.'" *Id.* at 382. The court ultimately concluded that the statute, as applied to the conduct at issue in the case, failed to provide sufficient notice of its criminality as required by the constitution. *Id.* at 386.

Even Congress itself has recognized that the laws in effect at the time of Andersen's conviction were ambiguous; this recognition contributed to the enactment of Sections 802 and 1102 of the Sarbanes-Oxley Act. The Senate Committee Report in connection with the passage of Sarbanes-Oxley specifically stated that "the current laws regarding destruction of evidence are full of ambiguities and limitations that must be corrected." S. Rep. No. 107-146, at 7 (2002).

The changes made to Section 1512 particularly, and the witness tampering statutes more generally, serve to highlight the ambiguity contained in Section 1512's prohibition against corrupt persuasion. Section 1512 now contains subsection (c), which criminalizes the conduct of the person who actually destroys documents "with the intent to impair" their "availability for use in an official proceeding." 18 U.S.C. § 1512(c) (West 2004). This was in response to recognition by Congress of the absurd result of criminalizing the conduct of the person who directs the document destruction, but failing to do so with respect to the person who actually destroys the documents. S. Rep. No. 107-146, at 7. Congress stated with respect to Anderson specifically that the government had been forced to "proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves." *Id.* Section 802 of the Sarbanes-Oxley Act also added Section 1519, making it a crime to destroy documents specifically in connection with federal

investigations. 18 U.S.C. § 1519 (West 2004). Referred to as the "new general anti-shredding" provision, 148 Cong. Rec. S7418-19 (daily ed. July 26, 2002), Section 1519 prohibits shredding of documents "in relation to or contemplation of" any matter within the jurisdiction of any department or agency of the United States. 18 U.S.C. § 1519

It is notable that both these new provisions do not use the term "corrupt persuasion." Rather, Section 1512(c) and Section 1519 specify the underlying conduct that is criminal, rather than the direction of such conduct, and thereby remove the "legal fiction." In all events, these amendments underscore the ambiguity of "corruptly persuades" as contained in Section 1512(b), as well as demonstrate the still-present need for clarification as to the term's specific meaning.

B. The Fifth Circuit's Interpretation of "Official Proceeding" Was Also Erroneous.

The Fifth Circuit's broad view of what constitutes the required nexus to an "official proceeding" in upholding that element of the jury instruction, *Anderson*, 374 F.3d at 284, is also unsupported by the statute, and further, removed an important means of distinguishing between legal and illegal behavior. While Section 1512 does not require that a proceeding be pending or about to be instituted, the district court went well beyond, defining a "proceeding" to include "all of the steps and stages in the agency's performance of its governmental functions, and it extends to administrative as well as investigative functions, both formal and informal." *Id.* at 297 n.32. The district court specifically rejected Andersen's effort to include a requirement that there be some proof that the defendant believed that *some* particular proceeding was likely to occur in the near future.

Without such a touchstone, however, there is a very real risk that perfectly legal conduct will be inadvertently transformed into illegal conduct. This Court recognized the importance of such a touchstone in *United States v. Aguilar*, 515 U.S. 593 (1995). There the Court concluded that without knowledge of a particular pending proceeding, a "defendant lack[s] the evil intent to obstruct." *Id.* at 599. Otherwise, in connection with practically every decision to throw a paper in the trash, one would have to play through every hypothetical scenario of the likelihood, or even mere possibility, of an agency inquiry to which that paper may be relevant — an impossible exercise. As discussed above, this has never been the intention of any obstruction of justice statute, and its practical implications, addressed *infra*, are overwhelming.

C. The Rule of Lenity Requires a Narrow Interpretation of an Ambiguous Criminal Statute.

The rule of lenity has a long history of use in American jurisprudence. The rule requires that criminal statutes be narrowly construed so as to provide society with fair notice as to what constitutes criminal conduct, and to allow the legislature alone to determine what conduct will be deemed criminal. *See* Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 Harv. C.R.-C.L. L. Rev. 197, 197 (1994). The rule has its foundation in *United States v. Wiltberger*, where the Court stated that "[t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principal, that the power of punishment is vested in the legislature, not in the judicial department." 18 U.S. 76, 95 (1820). Thus, where a criminal statute is unclear as to the conduct that it is meant to cover, the rule of lenity requires

that courts provide a narrow interpretation. "[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher one only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *see also United States v. Bass*, 404 U.S. 336, 347 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") (citation omitted); *Bell v. United States*, 349 U.S. 81, 83 (1955) ("It may be fairly said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against imposition of a harsher punishment.") The rule of lenity "provides a time-honored interpretive guideline when the congressional purpose is unclear." *Liparota v. United States*, 471 U.S. 419, 427 (1985).

This Court has continued to hold that the rule of lenity is the proper approach to statutory construction of a criminal statute, most recently in *Scheidler v. NOW, Inc.* 537 U.S. 393 (2003). There the Court, citing *McNally*, narrowly construed the Hobbs Act to find that the petitioner in that case had not committed the violation charged. Although Justices of this Court have been divided as to whether the rule of lenity should be applied where there is ambiguity in the wording of the statute, or only where ambiguity still exists after consultation with the legislative history, *United States v. R.L.C.*, 503 U.S. 291 (1992), the rule of lenity should be applied to this case in either instance, as Section 1512(b) is vague and ambiguous both on its face, and after consultation with the legislative history.

At least one court addressing the corrupt persuasion clause of Section 1512(b) has specifically stated that application of the rule of lenity is the proper approach to statutory interpretation in the context of the vagueness

contained in this statute. *See Farrell*, 126 F.3d at 489. In finding that the defendant in that case did not engage in conduct sufficient to rise to the level of corrupt persuasion — defined by the trial court in that case as persuasion with intent to hinder communication to law enforcement — the court stated that such a result was mandated by the rule of lenity. *Id.* ("Even if we did not find this the most reasonable reading, however, we would nevertheless find that it is a permissible one and that the rule of lenity requires its adoption in this case.")

Similarly, the rule of lenity is the proper approach in this case for several reasons. First, Section 1512(b) is clearly ambiguous. As discussed above, on the face of the statute, it is unclear whether Congress intended "corruptly" to be given its transitive or intransitive meaning. Further, it is unclear what types of conduct Congress intended to criminalize by adding "corrupt persuasion" to the list of conduct that encompass witness tampering as defined by Section 1512(b), and the legislative history is not elucidating. 134 Cong. Rec. S17, 360-02. It is simply uncertain whether Congress meant for Section 1512(b) to track the conduct covered by Section 1503, or whether the 1988 amendment to Section 1512(b) was merely meant to correct an inaccurate interpretation of the statute in a particular circuit. *Id.* (suggesting that the amendment was for the purpose of fixing a "gap" identified by the Second Circuit as between Section 1503 and Section 1512). Finally, as also discussed above, there is ambiguity as to the nexus required to an "official proceeding."

When ambiguity like that present here exists, as even the Fifth Circuit at least implicitly acknowledged, application of the rule of lenity is required. This is the only means by which to provide proper notice of the potentially criminal

conduct, and to maintain the legislative branch's discretion to determine the criminality of particular conduct. If not, courts, and in turn juries, are left to guess what conduct Congress intended to criminalize, with the enormous risk of unforeseen and unintended consequences.

II. The Fifth Circuit's Decision Sets A Dangerous Precedent And May Result In The Criminalization Of Ordinary Business Decisions Affecting Learned Professions.

The ambiguities left by the Fifth Circuit's upholding of the jury instruction have serious policy implications. Failure to define "corruptly persuades" to include a requirement that the purpose be objectively improper, and permitting its extension to all "fact-finding" activities of a governmental agency, creates the possibility that ordinary business and legal decisions will be transformed into potentially criminal conduct.

First, while Section 1512 and other statutes now deal more explicitly with retention of documents in certain specific and obvious circumstances, there are a host of other scenarios that such statutes do not explicitly address. Document retention policies are not, as some appear to imply, inherently evil. Companies, firms and partnerships, and particularly the accounting profession, generate enormous amount of documents and data on a daily basis. There are completely legitimate reasons not to maintain every piece of paper, including the financial costs of retention, as well as those associated with the possibility of litigation. The costs of producing documents and data in connection with litigation

are skyrocketing. Eric Van Buskirk, *Raging Debate: Who Should Pay for Digital Discovery*? N.Y.L.J., Jan. 27, 2003, at Col. 1 (noting that civil discovery is no longer affordable). There is, moreover, a valid concern that drafts and outdated documents will be taken out of context long after the fact. As to the accounting profession specifically, generally accepted auditing standards ("GAAS") have never required auditors to keep every document associated with an audit. GAAS AU § 339. And even the new requirements of the Sarbanes-Oxley Act, the securities laws, and the Public Company Accounting Oversight Board do not require retention of every document or piece of information reviewed or generated in connection with an audit. *See* Gary G. Grindler & Jason A. Jones, *Please Step Away from the Shredder and the "Delete" Key: §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 Am. Crim. L. Rev. (2004) (discussing various document retention requirements.)

Yet for the reasons discussed above, the Fifth Circuit has potentially put at issue the ability to develop and apply ordinary course document retention policies for practically any audit firm. CPAs, and particularly auditors in the practice of public accounting, are routinely faced with clients that have matters involving interactions with regulatory agencies. But if even a good faith and honestly held belief that application of a document retention policy can give rise to illegal conduct, then why would any accountant that has a client with any ongoing interaction with a regulator, even with respect to what may be a completely routine matter, ever recycle its documents in accordance with its ordinary policy?

Second, while there can be no doubt that the accounting issues that have given rise to the enactment of statutes like Sarbanes-Oxley Act are significant, it is an overreaction to cast a potential criminal net around nearly every decision that could have some impact on a governmental investigation. Yet, that is exactly the havoc that the Fifth Circuit has wreaked, through its intransitive definition of "corrupt," its encompassing of all "fact finding" of an agency, and its amorphous perspective on an "official proceeding." There is hardly a firm auditing a public company that will not find itself or its client the subject of a regulatory or similar inquiry at some point. Lawyers and others inside or outside the firm may be consulted regarding matters related to the inquiry, such as determining what to produce in response to document requests, or determining whether, what or when to report to a regulator in connection with such a matter. These are complex and often subjective judgments, requiring, among other things, assessments of the possibility of criminal or civil liability, application of the attorney-client privilege, and even the potential exercise of constitutional rights. (We understand that more specific examples of these types of issues are discussed at length in the briefs of petitioner and other *amici* and, accordingly, they will not be repeated here.)

Criminalizing what is believed to be lawful behavior regarding these types of decisions is not necessary, nor is it desirable. There are already numerous statutes applicable to the accounting and legal professions that explicitly and objectively set forth the boundry between permissible and criminal conduct, including securities fraud statutes, mail, wire and bank fraud statutes, and unambiguous obstruction of justice statutes. There are, in addition, state criminal statutes, and, specifically as to the accounting profession, the AICPA's Code of Professional Conduct, and, as to the legal profession, various codes and rules of professional responsibility. The prospect of criminal liability

under some vague criminal statute that might be given some novel interpretation is simply not a necessary deterrent to illegal conduct.

But more importantly, the vagaries of a decision such as the Fifth Circuit's come at great cost not only to the profession, but ultimately to the public. The accounting profession and its clients are already burdened by a massive increase in litigation and other legal costs. *See* John J. Rapisardi, *Second Circuit Decisions May Increase Accountant/Auditor Liability*, N.Y.L.J., Sept. 21, 2000, at Col. 1 (noting that "litigation costs for accountants continue to grow," especially because "accountants may be viewed as defendants with deep pockets"); Elizabeth MacDonald, *More Accounting Firms Are Dumping Risky Clients*, Wall St. J., Apr. 25, 1997, at A2. Increasing legal and related costs are passed on to the clients in the form of more expensive auditing services. While large clients may find themselves paying increased audit fees reflecting higher prices for malpractice insurance, small clients may not only pay increased fees, but may have trouble finding auditors at all. *See, e.g.*, Lynnley Browning, *Sorry, the Auditor Said, but We Want a Divorce*, N.Y. Times, Feb. 6, 2005; Jeffrey R. Cohen & Dennis M. Hanno, *Auditor's Consideration of Corporate Governance and Management Control Philosophy in Preplanning and Planning Judgments*, Auditing: A J. Prac. & Theory, (Oct. 2000) ("Audit firms increasingly focus on identifying risky clients"). Small clients may be left with a shrinking pool of accountants willing to bear the higher risk—which includes the risk of regulatory matters—associated with audits of small-companies. *See* Lynnley Browning, *Sorry, the Auditor Said, but We Want a Divorce*, N.Y. Times, Feb. 6, 2005; Carl Pacini, Mary J. Martin & Lynda Hamilton, *At the Interface of Law and Accounting*, 37 Am. Bus. L.J. 171, 173 (2000) (noting that increased litigation has caused accounting

firms to be "more aggressive in refusing to render services to high-litigation-risk firms."); Frederick Jones and K. Raghunandan, *Client Risk and Recent Changes in the Market for Audit Services*, 17 J. Acct. & Pub. Policy 169, 171-172 (1998); Elizabeth MacDonald, *More Accounting Firms Are Dumping Risky Clients*, Wall St. J., Apr. 25, 1997, at A2. In sum, the victims of this unnecessarily increased risk ultimately will be shareholders and consumers, who will bear higher auditing costs and reduced auditing services.

Criminal penalties are intended to punish only the most extraordinary conduct — conduct that has been clearly identified as repulsive to societal norms. New criminal statutes applicable to companies and employees, such as the Sarbanes-Oxley Act, are multiplying. At a minimum, courts should be reminded that in the instance of a vague criminal statute, such as that at issue here, it is necessary to apply the rule of lenity. This is the only means by which to ensure the appropriately narrow interpretation of criminal statutes, and that such statutes are applied only to conduct that is genuinely and objectively criminal. Otherwise, the consequences that the profession and, ultimately, the public may suffer will be profound.

CONCLUSION

This Court should reverse the decision of the Fifth Circuit upholding the jury instruction for all the reasons set forth above.

Respectfully submitted,

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ARTHUR ANDERSEN LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 12,200 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and fair administration of justice, with a focus on the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations. In furtherance of this and its other objectives, NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.[1] NACDL has a particular interest in this case because the decision of the court below could interfere with the ability of NACDL's members to represent their clients, expose NACDL members to punishment for fulfilling their ethical duties to clients, and undermine the adversarial process essential to fairness in the criminal justice system.

SUMMARY OF ARGUMENT

This case places lawyers at risk of investigation, prosecution, and imprisonment for doing their jobs. When a

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored any part of the brief, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

lawyer represents a client in connection with a potential government investigation, one of the lawyer's goals may appropriately be to prevent the government from developing evidence against the client. Within the bounds of ethics and the law, that is what lawyers do.

By expanding the definition of "corruptly persuades" in 18 U.S.C. § 1512(b)(2) to encompass legal advice directed to that end, the Fifth Circuit's ruling will chill zealous legal representation, create potential conflicts between counsel and client, and undermine faith in the privacy of attorney-client communications.

This case is a prime illustration of the dangers unleashed by the Fifth Circuit's approach. In prosecuting the accounting firm Arthur Andersen LLP ("Andersen"), the government singled out the conduct of an in-house lawyer, Nancy Temple. Her crime, in the government's view, was providing legal advice even before the SEC had issued a subpoena or launched a formal investigation. Specifically, she reminded Andersen employees to adhere to a lawful, established document retention policy and recommended changes to a draft memorandum – actions that lawyers undertake every day. According to several of the jurors, her edits to the draft memorandum were the principal basis for Andersen's conviction.

By criminalizing this conduct, the Fifth Circuit disregards the traditional role of lawyers, which includes a duty to protect their clients by deflecting potential government investigations. In the court's view, this goal itself is "improper" and reflects a "corrupt" purpose. Any action by the lawyer – such as vigorously asserting privileges, counseling potential witnesses about their rights, or, as here, advising employees about a company's document retention policy and editing a draft memorandum – can violate the witness tampering statute if it is motivated even in

part by this goal. Lawyers in the post-*Andersen* era now will operate in fear of investigation and prosecution. Those fears inevitably will dampen the zealousness of their advocacy. And that will imperil the fair administration of justice.

If allowed to stand, the decision below also will damage the attorney-client relationship by engendering potential conflicts of interest between lawyers and clients. On every close call regarding tactical and legal issues – and on many that are not so close – lawyers will have to weigh in the balance their own potential exposure to criminal liability. Yet the fundamental tenet of the attorney-client relationship is that the lawyer's commitment to the client must be undiluted by concerns for his or her own personal interests. Moreover, by expanding the government's ability to investigate counsel, the Fifth Circuit's decision undermines the communication between attorney and client. If the advice of the Andersen lawyer here amounts to witness tampering, then communications long assumed to be privileged are in jeopardy of disclosure under the crime-fraud exception. Clients who are uncertain of the loyalty of their counsel or the confidentiality of their communications will simply not disclose information their lawyers need to know. That, too, imperils the fair administration of justice.

Although the obstruction of justice provisions are not intended to reach "lawful, bona fide, legal representation," 18 U.S.C. § 1515(c), the Fifth Circuit's decision leaves this so-called "safe haven" an empty defense. Under the jury instructions that were upheld below, any legal advice that makes it harder for the government to develop evidence may "impede" an investigation; that which impedes is "improper"; that which is improper is "corrupt"; and that which is corrupt is unlawful. The government will likely repeat in future cases the argument it advanced in this one: Conduct that falls within the broad scope of Section 1512(b) is criminal, and thus not protected as lawful, bona fide legal representation.

The Fifth Circuit's extraordinarily expansive ruling thus collides with the fundamental premises underlying our system of justice. It is important that the Court reverse this holding to prevent further damage to the rights of defendants, the attorney-client relationship, and the integrity of the judicial process.

BACKGROUND

Beginning in October 2001, as press reports revealed apparent financial problems at Enron Corporation, employees of Andersen – Enron's accountants – began to recognize the possibility of SEC or other regulatory inquiries. Several of the employees realized that the Enron audit team at Andersen had not been following established document retention policies, and reminded those employees to do so. Part of the document retention policy required the deletion of draft documents, while leaving the final versions in Andersen's files.[2]

On several occasions, Temple, an in-house lawyer, reminded Andersen employees to follow Andersen's document retention policy. For example, on October 12, 2001, Temple advised certain Andersen partners that "[i]t might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy." GX 1012A.

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[2] Even the government did not argue at trial that the document retention policy itself was illegal. The policy required destruction only of materials that were not part of the audit file. Anything necessary to support the final audit report was preserved and only superseded drafts or other materials not used to support the testing performed in the audit were destroyed. GX 160A.

Citations to "GX" refer to the government's trial exhibits and "R." to the record filed in the Fifth Circuit.

On October 16, 2001, Enron issued a quarterly earnings release to the public. David Duncan, Andersen's lead partner on the Enron engagement, had serious concerns about Enron's characterization of certain charges as "non-recurring." Duncan had expressed his concerns to Enron officials, but the release was not changed. Duncan decided to write an internal draft memorandum documenting the disagreement. He circulated the draft memorandum to Andersen partners in the practice risk management group and to Temple.

Temple e-mailed suggested changes and copied the partners in the practice risk management group. GX 1018B. Specifically, her e-mail proposed that Duncan "delet[e] some language that might suggest we have concluded the release is misleading." *Id.* She also recommended removing "reference to consultation with the legal group and deleting my name on the memo," in order to avoid a waiver of the attorney-client privilege and to reduce the likelihood that counsel might be called as a witness. *Id.* She indicated that she would consult further with the legal group about additional steps to limit Andersen's exposure under securities law. *Id.*

Andersen employees continued to take steps to comply with the established document retention policy into November, when Andersen received an SEC subpoena. At that time, Andersen immediately directed its employees to preserve all documents related to the Enron engagement.

The government charged Andersen with knowing and corrupt witness tampering under 18 U.S.C. § 1512(b)(2). The indictment focused entirely on the alleged destruction of documents related to Andersen's auditing work for Enron. The government charged that Andersen officials had obstructed an official proceeding by "corruptly persuad[ing]" employees to shred documents and to delete electronic

records to keep them from the SEC. The government's theory was that, at the time of the charged offense, the Andersen officials anticipated an SEC investigation of Enron's accounting practices, even though Andersen had received no subpoena or other formal notice of such an investigation.

At trial, the government offered into evidence e-mails and notes from Temple – including the e-mail exchange regarding Duncan's internal memorandum about the Enron earnings report. Temple was one of several Andersen officials, but the only lawyer, whom the government accused of acting corruptly.

After 10 days of deliberations and an *Allen* charge, the jury convicted Andersen on the sole count of witness tampering. The court's instructions to the jury had broadly defined the term "corruptly persuades" in 18 U.S.C. § 1512(b). The prosecution had argued vigorously that Temple's legal advice was part of a pattern of obstruction, and the court's charge allowed the jury to convict on that basis. Indeed, it appears that the jurors convicted Andersen solely based on Temple's advice – specifically, her four paragraph e-mail proposing changes to the draft memorandum. According to a post-conviction press conference with four jurors and press interviews with several others, the jury determined that Temple was guilty of "corruptly persuad[ing]" others with "the intent to make evidence unavailable at an official proceeding" because she suggested edits to the draft.[3] The jury was apparently not

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[3] *See, e.g.*, Jonathan D. Glater & John Schwartz, *Jurors Tell of Emotional Days in a Small Room*, N.Y. Times, June 17, 2002, at A14 (juror Wanda McKay stating: "When we looked at the Nancy Temple stuff, and with the instructions that the judge gave us, there was no way we could not find Arthur Andersen guilty. . . . Nancy Temple was found guilty of altering one document . . . . One person did one thing and tore

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persuaded that the government's evidence of document destruction established guilt.[4]

On appeal, the Fifth Circuit affirmed the conviction. The court held, among other things, that the trial court had properly instructed the jury regarding the definition of "corruptly persuades" in 18 U.S.C. § 1512(b).

ARGUMENT

I. LAWYERS HAVE A DUTY TO DEFEND THEIR CLIENTS ZEALOUSLY, WHICH PROPERLY INCLUDES STRATEGIES TO LIMIT LIABILITY IN POTENTIAL GOVERNMENT INVESTIGATIONS.

Forceful and vigorous advocacy is the duty of the lawyer, the right of the client, and the foundation of our adversarial system of justice. That system, as this Court has held, "is premised on the well-tested principle that truth – as well as fairness – is best discovered by powerful statements on both sides of the question." *Penson v. Ohio*, 488 U.S. 75, 84-85 (1988) (quotations omitted). An attorney has a

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the whole company down."); Mary Flood, *The Andersen Verdict; Decision by Jurors Hinged on Memo*, Hous. Chron., June 16, 2002, at A1 (jury foreman stating that Temple e-mail "was a 'smoking gun.'"); Tom Fowler & Todd Ackerman, *The Andersen Verdict; Andersen Guilty; Outcome Viewed as Final Blow For Firm*, Hous. Chron., June 16, 2002 at A1 (reporting that several jurors said they unanimously agreed that Temple was the "corrupt agent").

[4] *See, e.g.*, Cassell Bryan-Low, *Andersen: Called to Account: Foreman Was Last to be Persuaded*, Wall St. J., June 17, 2002 at C13 (jury foreman stating, "We had to ensure that someone corruptly persuaded someone else to do something that would result in the impairment of a fact-finding capability of an official proceeding . . . . [T]hat almost had nothing to do with shredding documents.").

"constitutional duty to advocate zealously on the client's behalf." *McCoy v. Ct. of Appeals*, 486 U.S. 429, 447 (1988). Indeed, the "constitutional requirement of substantial equality and fair process . . . can only be attained where counsel acts in the role of an active advocate in behalf of his client." *Id.* (quotations omitted). Particularly in the context of criminal law, zealous representation is not simply desirable but constitutionally mandated. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 689 (1984) (discussing defense counsel's "overriding mission of vigorous advocacy of the defendant's cause").

Attorneys have an ethical obligation to represent their clients zealously and diligently within the bounds of the law. *See* Model Rules of Prof'l Conduct R. 1.3 cmt. 1 (2004) [hereinafter Model Rules]. Further, a lawyer must "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor," "despite opposition, obstruction or personal inconvenience to the lawyer." *Id.* Indeed, "[t]he advocate has a duty [properly] to use legal procedure for the fullest benefit of the client's cause . . . ." Model Rules R. 3.1 cmt. 1. Thus, lawyers are obligated to do their utmost in defending a client under investigation. And they are obligated to pursue the client's objectives through all means permitted by law.

Of course, individuals who are potential targets of an investigation have every right under the Fifth Amendment to remain silent and to decline to assist the government in putting together its case. And inevitably in the practice of law a zealous advocate will devise and execute legitimate strategies intended, at least in part, to deflect an investigation. In essence, that is a lawyer's job. *See, e.g., Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) ("Indeed, an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act

independently of the Government and to oppose it in adversary litigation.").

This Court has even recognized that professional obligation as a defendant's constitutional right. In *Miranda v. Arizona*, the Court stated:

> An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case . . . . In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath – to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

384 U.S. 436, 480-81 (1966). *See generally* Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1288 (1975) ("Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty."); Kenneth Mann, *Defending White Collar Crime* 5 (1985) ("[T]his is the central theme of the white-collar crime defense function, the defense attorney works to keep potential evidence out of government reach by controlling access to information."); Julie R. O'Sullivan, *Federal White Collar Crime* 12 (2001) ("[T]he challenges facing defense counsel are . . . limiting, consistent with ethical and legal constraints, government access to incriminating evidence . . . .").

II. THE FIFTH CIRCUIT'S INTERPRETATION OF "CORRUPTLY PERSUADES" IS WRONG.

Despite the well-established professional obligations of lawyers and the legal rights of clients, the Fifth Circuit interpreted 18 U.S.C. § 1512(b)(2) to criminalize legal advice offered to impede fact-finding in an official proceeding.

The language of the statute is not so all-encompassing. Section 1512(b)(2) makes it a crime to "corruptly persuade[] another person" with the intent to "cause or induce any person to . . . withhold a record, document, or other object, from an official proceeding; [or] alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . ." 18 U.S.C. § 1512(b)(2)(A)&(B). The district court, in instructing the jury, defined the term "corruptly persuade" to mean "having an improper purpose," which it in turn defined as "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." Pet. App. 18a, 48a. Unfortunately, these instructions, as approved by the Fifth Circuit, sweep in a broad range of legitimate attorney conduct. This interpretation of "corruptly persuades" is both wrong and dangerous.

The term "corruptly" necessarily requires more culpability than the mere intent to hinder an investigation. The jury instructions that the Fifth Circuit upheld essentially read the word "corruptly" out of the statute and conflate "an improper purpose" with another requirement of the provision – the intent to make evidence unavailable to an official proceeding. The Fifth Circuit's decision tries, but fails, to show that these two intent requirements are *not* strictly identical. *See* Pet. App. 21a-23a (distinguishing intent to induce another to make document unavailable and intent to hinder fact-finding ability of proceeding, which implies greater "degree of personal culpability"). The jury was never

asked to draw such a fine line, nor could they be expected to do so.

The record in this case highlights the futility of the court's exercise in wordplay. If a lawyer, or – as here – the lawyer's client, can be guilty of subverting, undermining, or impeding the fact-finding function of an investigation simply by conveying routine legal advice about an accepted document retention policy or suggesting changes to a draft internal memorandum, then it is difficult to discern the outer boundaries of potential liability. Indeed, if to "impede" an investigation is to "hold [it] up," as the Fifth Circuit defined the term, Pet. App. 22a, any action intended to reduce the availability of information and make investigators look elsewhere to build their case would constitute a crime.

Under the Fifth Circuit's opinion, routine legal judgments could be considered "corrupt" and expose an attorney to criminal liability. For example:

- An in-house attorney is asked to review a draft report that must be sent to the SEC. The lawyer and client are well aware that after the report is issued, the government will likely use it in an anticipated investigation. The lawyer suggests changing the language of the draft to exclude factual information that is not technically required in the report, but which he knows would greatly assist the government's fact gathering. The client deletes the offending language. The lawyer's advice would "cause . . . [a] person to . . . alter . . . an object," potentially in violation of Section 1512(b)(2)(B).

- A client possesses critical (and exclusive) information in a case being investigated by the government and likely to proceed to the grand

jury stage. Investigators request an informal interview and the lawyer advises the client not to cooperate. The client follows that advice and the government never learns the critical facts. Under the Fifth Circuit's reasoning, the lawyer's advice would potentially violate Section 1512(b)(2)(A) because he "induce[d] [a] . . . person to . . . withhold testimony . . . from an official proceeding."

- A client is subpoenaed before a grand jury. She has relevant information but is concerned about embarrassment or perhaps unrelated civil consequences should the information ever become public. Her lawyer counsels her not to volunteer any information, to answer only the question asked, and to interpret the scope of each question as narrowly as possible. The client follows the advice. The government fails to ask the right questions and never learns the information that she does not volunteer. Again, the lawyer's advice has "induce[d]" the withholding of testimony from an official proceeding, potentially in violation of Section 1512(b)(2)(A).

- A client corporation receives a grand jury subpoena for documents as part of an antitrust investigation. The lawyer advises the client that certain documents, such as the personal calendars of company executives, are personal documents, not corporate documents, and hence are not responsive to the subpoena even though they contain relevant information. As a result, the client does not produce documents that would help the government build its case. The lawyer's advice would potentially violate Section 1512(b)(2)(A) because it "cause[d] [a] . . . person

to . . . withhold a . . . document . . . from an official proceeding."

In each case, the attorney – whether in-house or outside counsel – has devised strategies and "persuaded" the client to follow them for the purpose, in part, of preventing the government from learning factual evidence. These examples, every bit as routine and, under the Fifth Circuit's standard, every bit as "corrupt" as the advice in *Andersen*, demonstrate the extraordinary reach of the Fifth Circuit's decision in several respects:

First, the Fifth Circuit's interpretation of the term "corruptly" extends to other provisions of Section 1512, which prohibit far more than the destruction or alteration of documents. Under Section 1512(b)(1), for example, it is unlawful to "corruptly" persuade another person with the "intent to influence, delay, or prevent the testimony of any person in an official proceeding." Under Section 1512(b)(3), it is unlawful to "corruptly" persuade another person with the intent to "hinder, delay, or prevent" the reporting of a possible Federal offense to a law enforcement officer.

Second, the Fifth Circuit made clear that the government can prove obstruction even though a lawyer's intent to impede an investigation is not his or her exclusive, or even primary, goal. The district court defined "corruptly" as having "*an* improper purpose" and directed the jury that "[t]he improper purpose need not be the sole motivation for the Defendant's conduct so long as the Defendant acted, at least in part, with that improper purpose." Pet. App. 48a (emphasis added). Thus, a lawyer could have numerous legitimate and overriding motives for giving legal advice – preserving the attorney-client privilege, complying with ethical obligations, testing the legal bases of the government's claims – but if she also intends in part to deflect an investigation, she has committed a crime.

Third, the broad sweep of the term "official proceeding" in Section 1512, as defined by the Fifth Circuit, magnifies the risk of liability for lawyers. Section 1512 provides that the "official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(f)(1). The district court declined to instruct the jury, as Andersen had requested, that an official proceeding had to be "ongoing or . . . scheduled to be commenced" or even that the corrupt persuader must have "had in mind a particular proceeding that it sought to obstruct." Pet. App. 26a. It was legally irrelevant, in other words, that there were "investigators around the corner" in this case. Pet. App. 25a. Under the Fifth Circuit's reasoning, a lawyer is vulnerable if there is a potential investigation of one sort or another anywhere on the horizon.

The language of the statute does not compel this assault on common sense. As Andersen argues in its brief, the term "corruptly" necessarily requires something more – for example, an independent violation of the law – than rendering advice with the intent, in part, to make evidence unavailable to the government.

III. THE FIFTH CIRCUIT'S INTERPRETATION OF "CORRUPTLY PERSUADES" WILL CHILL THE ZEALOUS REPRESENTATION OF CLIENTS AND INTERFERE WITH THE ATTORNEY-CLIENT RELATIONSHIP.

As a result of the Fifth Circuit's decision, lawyers face a classic Catch-22. Conduct which itself is perfectly legal and proper – implementing a document retention policy, editing a draft memorandum, interpreting a subpoena narrowly – can limit the availability of evidence in a future government proceeding. But attorneys looking out for the best interests of their clients, as they are obligated to do, cannot recommend this conduct without a credible fear that

they might be found guilty of "corruptly persuading" another. The Fifth Circuit's reading of the statute thus deters the zealous representation that professional responsibility demands and erodes the trust that is critical to the attorney-client relationship.

These dangers are acute in the wake of the decision below. In blurring, if not erasing, the line between zealous advocacy and obstruction, the Fifth Circuit has made it impossible for a lawyer intelligently to ascertain where his constitutional and ethical duties as an effective advocate end, and where his exposure to criminal liability for witness tampering begins. Criminal defense lawyers and corporate counsel, uncertain of the reach of Section 1512 and how a prosecutor might perceive their conduct, may well curtail legitimate and zealous advocacy for their clients.

The Fifth Circuit's over-broad opinion also creates a potential conflict of interest between the lawyer and the client, compromising the attorney's duty of loyalty and impairing the attorney-client relationship.

This Court has long recognized that the constitutional right to counsel contains a correlative right to representation unimpaired by conflicts of interest or divided loyalties. *See, e.g.*, *Ferri*, 444 U.S. at 204 (noting that defense counsel's "principal responsibility is to serve the undivided interests of his client"); *Strickland*, 466 U.S. at 688 ("Representation of a criminal defendant entails certain basic duties. . . . [C]ounsel owes the client a duty of loyalty, [and] a duty to avoid conflicts of interest.") (citing *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980)). Other courts have followed suit, holding that a "defense attorney must be free to use all his skills to provide the best possible defense for his client." *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir.), *cert. denied*, 444 U.S. 833 (1979); *see also id.* ("[A] defendant may not be

represented by counsel who might be tempted to dampen the ardor of his defense . . . .").

If zealous representation of the client exposes a lawyer to criminal investigation, he or she has a conflict of interest with the client. The risk of investigation and prosecution, as noted, may "dampen the ardor of [the lawyer's] defense," *id.*, with the consequence that counsel fails to provide legal advice and carry out other important strategies on behalf of the clients for fear of personal liability. *See, e.g.*, *United States v. Merlino*, 349 F.3d 144, 151 (3d Cir. 2003) ("An attorney who faces criminal or disciplinary charges for his or her actions in a case will not be able to pursue the client's interests free from concern for his or her own."), *cert. denied*, 124 S. Ct. 1726 (2004); *Mannhalt v. Reed*, 847 F.2d 576, 581 (9th Cir.) ("[W]hen an attorney is accused of crimes similar or related to those of his client, an actual conflict exists because the potential for diminished effectiveness in representation is so great."), *cert. denied*, 488 U.S. 908 (1988); *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984) ("What could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities?"). Indeed, courts have reversed convictions when counsel faced personal consequences far less severe than a potential witness tampering conviction (fines and imprisonment of up to 10 years). *See* 18 U.S.C. § 1512(b).[5]

[5] *See, e.g.*, *Walberg v. Israel*, 766 F.2d 1071, 1077-78 (7th Cir.), *cert. denied*, 474 U.S. 1013 (1985) (granting writ of habeas corpus when lawyer's desire to receive future appointments from trial judge may have prevented defense counsel from pursuing vigorous defense); *United States v. Ah Kee Eng*, 241 F.2d 157, 161 (2d Cir. 1957) (recognizing potential for injustice when judge personally belittles defense counsel's positions because "[a] less experienced advocate might well have trimmed his sails . . . and thus have jeopardized the rights and the proper interests of a defendant on trial for a serious felony").

Any lawyer who must consider his or her own liability when revising a draft memorandum for a client is in an untenable position. The client is entitled to undiminished ardor, to representation untainted by the lawyer's personal concerns.

The Fifth Circuit's decision further threatens the essential flow of communication between attorney and client. For more than one hundred years, this Court has recognized that the "administration of justice" depends on the ability of individuals seeking legal assistance to confide in an attorney without the "apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.").

Confidentiality is the bedrock of the attorney-client relationship. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 60 cmt. b (1998) ("[T]he confidentiality rule reflects a considered judgment that high net social value justifies it."); Laws. Man. on Prof. Conduct (ABA/BNA) 55:302 (May 20, 1992) ("[C]onfidentiality facilitates the fact-finding process that is critical to representation and also has the effect of encouraging early legal consultation."); Model Code of Prof'l Responsibility EC 4-1 (1980) (discussing "ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client"). A client's confidences have been protected both by the attorney's ethical duty of confidentiality and by the evidentiary privilege afforded to attorney-client communications.

The Fifth Circuit's interpretation of the witness tampering statute substantially expands a federal prosecutor's authority to inquire into attorney-client communications –

communications that were previously routine and did not raise any implications of criminal conduct. Discussions between attorney and client are not privileged if they are in furtherance of a crime or fraud. *See, e.g., United States v. Zolin*, 491 U.S. 554, 563 (1989).[6] As "impeding" the flow of information to a prosecutor is unlawful under the Fifth Circuit's approach, discussions between attorney and client directed to that end may not be privileged. Or at least aggressive prosecutors may so claim, seizing the opportunity the Fifth Circuit has created to subpoena counsel before the grand jury and seek to learn the contents of counsel's advice to his or her client.[7]

The mere potential for such meddling will undercut clients' faith that their communications with counsel will be confidential. Indeed, careful lawyers, at the outset of a relationship or at the inception of a conversation, may find it prudent to advise their clients of the risk that the communications between them may be disclosed. They may need to reiterate or highlight that advice as they make tactical decisions that anger the prosecutors or otherwise increase the likelihood that counsel will come under investigation. With a diminished assurance of confidentiality, the client may

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[6] Intrusion into attorney-client confidences has been justified by extreme circumstances such as an attorney's deliberate effort to tamper with witnesses, destroy subpoenaed materials, or engage in fraud upon the court. *See, e.g., Osborn v. United States*, 385 U.S. 323 (1966); *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983); *In re Doe*, 662 F.2d 1073, 1080-81 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). The Fifth Circuit opinion greatly expands the circumstances in which the privilege may be pierced from the extreme to the routine.

[7] Likewise, a clever lawyer may use the Fifth Circuit's interpretation to invoke the crime-fraud exception in civil litigation and seek to discover his or her adversary's advice to clients, on the grounds that counsel impeded the flow of information to the court and thereby committed a crime.

choose not to speak candidly with the attorney. *See, e.g., Fisher v. United States*, 425 U.S. 391, 403 (1976) (recognizing that "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice" if the client knew that damaging information could be obtained from his lawyer).[8]

The chill on attorney-client communications can arise even if the prosecution never in fact penetrates the attorney-client privilege. Prosecutors, newly emboldened by the Fifth Circuit's holding to investigate legal advice, may call counsel before the grand jury. Grand jury testimony is secret. The client will not know, other than through counsel's own report, what the lawyer said. Such testimony would breed mistrust and arouse the client's concern about the confidentiality of her communications to counsel.

By curbing the flow of information between attorney and client, such "apprehension of disclosure" imperils the attorney-client relationship and undermines the administration of justice. *See Hunt*, 128 U.S. at 470; *see also, e.g., Upjohn*, 449 U.S. at 388. Without complete information, counsel cannot effectively negotiate plea agreements and cannot determine what the client has to offer in cooperating with the government. Law enforcement could suffer, and the legal process will be less effective in ferreting out the truth.

It is no answer to trust in the wise discretion of the prosecution. To begin with, as has often been said, this is a

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[8] Since prudent and ethical counsel would so advise their clients prior to obtaining information, the Fifth Circuit's ruling could well drive clients who have something to hide "underground" – to lawyers who are not as ethical or careful, and therefore do not accurately apprise their clients of the potential incursions into privileged communications, and/or may be more likely to stray from the contours of appropriate advice or conduct.

government of laws, not of men. *See, e.g.*, *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 321 (1999). Moreover, it is the *potential* intrusion that creates the chill – exacerbated, no doubt, when the onslaughts actually occur, but abiding nonetheless even if they are infrequent.

IV. THE FIFTH CIRCUIT'S INTERPRETATION OF "CORRUPTLY PERSUADES" NULLIFIES THE SAFE-HAVEN FOR BONA FIDE LEGAL REPRESENTATION IN SECTION 1515(C).

Even before the witness tampering statute was amended to prohibit acts of "corrupt persuasion," Congress recognized the need to protect lawyers from being unfairly subject to criminal prosecution merely for zealously advocating on behalf of their clients. In 1986, Congress enacted 18 U.S.C. § 1515(c), which was designed to limit the obstruction of justice provisions by protecting attorneys who "provid[e] . . . lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." According to the legislative history of Section 1515(c), Congress had received "complaints of prosecutor's [sic] harassing members of the defense bar." 132 Cong. Rec. 32,805 (Oct. 17, 1986) (Rep. Berman, introducing section-by-section analysis). Congress enacted Section 1515(c) to make clear that "[v]igorously and zealously representing a client . . . is not a basis for charging an offense under the obstruction of justice chapter." *Id.*

Several courts of appeals have recognized Section 1515(c) as a "safe harbor" for attorneys engaged in the practice of law and "a complete defense" to obstruction of justice. *See United States v. Kloess*, 251 F.3d 941, 948 (11th Cir. 2001); *United States v. Davis*, 183 F.3d 231, 248, *amended by* 197 F.3d 662 (3d Cir. 1999); *United States v. Kellington*, 217 F.3d 1084, 1098 (9th Cir. 2000); *United States v. Crawford*, 60 Fed. Appx. 520, 531 (6th Cir. Feb. 12, 2003) (unpublished decision).

The Fifth Circuit, however, apparently holds a different view. Although the decision below did not analyze or cite Section 1515(c), the court's interpretation of the phrase "corruptly persuades" in the witness tampering statute effectively vitiates the safe harbor provision for attorneys. Section 1515(c) protects only "lawful, bona fide" legal representation. Under the jury instructions upheld by the court below, however, any legal advice rendered with the intent to "impede" (*i.e.*, to "hold up") an investigation is "improper"; that which is improper is "corrupt"; and that which is corrupt is unlawful. It cannot, then, constitute "lawful, bona fide, legal representation." 18 U.S.C. § 1515(c). Thus, even as the lower court's reading of the statute intrudes deeply into the day-to-day practice of law, Section 1515(c) affords no real shelter, because the contours of "lawful, bona fide" legal representation are so narrow.

The record in this case not only exemplifies the risks posed by the Fifth Circuit's decision, it also demonstrates how that ruling annuls the safe harbor provision. As noted, one of the key pieces of evidence was an e-mail by in-house attorney Temple, recommending that a draft internal memorandum about Enron's quarterly press release drop "some language that might suggest we have concluded the release is misleading." GX 1018B. The government, in a post-conviction filing, argued strenuously that Temple had "advocated the creation of a deliberately misleading document to supersede a more damaging and accurate draft version which would be destroyed." R. 1423.

Lawyers review draft documents for their clients all the time. They routinely recommend revising or deleting inflammatory, pejorative, or potentially incriminating language, often, at least in part, to limit exposure in the event

of a possible future government investigation. In the words of one ethics scholar: "'Don't put it in writing' is advice lawyers give every day – to protect clients from creating documents that may be used, or often misused, to their detriment." Stephen Gillers, *The Flaw in the Andersen Verdict*, N.Y. Times, June 18, 2002, at A23. The advice is so routine that lawyers on the lecture circuit have a name for it, the *New York Times* rule: "Before writing something down, consider how it would look on the front page of the *New York Times*." *See, e.g.*, Jack V. Auspitz & Susan E. Quinn, *Litigators' View of Due Diligence*, 1368 PLI/Corp 107, 173 (2003); Ellis R. Mirsky, *Managing the Litigation Process*, 407 PLI/Lit 9, 30 (1991).

Nonetheless, the government in this case repudiated Andersen's suggestion that Temple was engaged in lawful, bona fide, legal representation. In its view, "Temple was not giving legal advice; she was giving illegal advice." R. 1415.[9] Under the Fifth Circuit's over-broad interpretation of Section 1512(b), this conclusion is probably unavoidable – which is precisely why the protection of the safe harbor provision is illusory.

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[9] Notably, the government did not stop there. Before the trial court, it argued that there is "no meaningful difference" between the lawyer's conduct in the case at bar and the following hypothetical situations:

- The memorandum's author is drafting the memorandum while the in-house attorney looks over his shoulder. She advises him to delete the word "misleading" as she watches him type it on his word processor.
- The memorandum's author consults with the in-house attorney *before* writing his first draft, and she advises him to leave the word "misleading" out of the document.

R. 1417 n.8 (responding to R. 1383 n.2). According to the government, these two scenarios and the lawyer's actual conduct in the case are tantamount to "coaching a witness to lie," and are "prohibited by the obstruction statutes." *Id.* Indeed, if the government is correct, they are also legally equivalent under Section 1512(b) to using intimidation, threats, or force to prevent a witness from testifying.

What was it about Temple's advice that rendered it illegal in the government's view? As the government made clear in the trial court, *any* legal advice to Andersen to hold back from offering a full and complete accounting of the truth could constitute witness tampering under the court's interpretation of the law – and as such, would not qualify as "lawful, bona fide, legal representation" under Section 1515(c). But if that suffices to blockade the safe harbor, then the harbor is not safe at all. Indeed, it would be inaccessible to those it is intended to protect. Lawyers making day-to-day and minute-to-minute judgments may find themselves at the wrong end of a criminal prosecution if the government takes issue with their turn of phrase.

This outcome is not an inevitable by-product of the statute. Rather, it is a direct consequence of the Fifth Circuit's over-reaching interpretation of Section 1512(b), which defines "corruptly persuades" in such broad strokes as to criminalize legitimate acts of legal representation. In contrast, the Eleventh Circuit has recognized that the concept of "an improper purpose" must give meaning to the safe harbor provision:

> In order to convict a defendant under Section 1512(b)(3), the government must prove that the defendant acted with an improper purpose. Section 1515(c) provides a complete defense to the statute because *one who is performing bona fide legal representation does not have an improper purpose.* His purpose – to zealously represent his client – is fully protected by the law.

Kloess, 251 F.3d at 948 (citations omitted and emphasis added). This kind of approach, essentially the inverse of the Fifth Circuit's, affords lawyers the necessary freedom to

represent their clients' interests without fear that zealous representation alone will lead to criminal prosecution.

CONCLUSION

The Fifth Circuit's flawed reading of Section 1512(b) intrudes on a broad range of conduct at the very core of the traditional functions that counsel perform. As a result of this decision, many lawyers may shy away from aggressive but legal strategies in defense of their clients, for fear of criminal investigation and possible prosecution. Whether intended or not, the decision below thus deters the zealous advocacy that the Rules of Professional Responsibility and the Constitution demand. Moreover, it impairs the attorney-client relationship and in particular impedes the flow of information between attorney and client, with potentially disruptive consequences for the courts. The statutory safe harbor, which should protect against these harms, does not do so, because the Fifth Circuit has essentially defined that provision out of existence.

The Court should correct the erroneous ruling below and reverse this conviction. The integrity of our system of justice is at stake.

Respectfully submitted,

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ARTHUR ANDERSEN LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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The New York Council of Defense Lawyers ("NYCDL") respectfully submits this brief as *amicus curiae* in support of the Petitioner, Arthur Andersen, LLP.

INTEREST OF THE *AMICUS CURIAE*

The New York Council of Defense Lawyers is a not-for-profit professional association of approximately 200 lawyers (many of whom are former federal prosecutors) whose principal area of practice is criminal defense in the federal courts of New York.[1] The NYCDL's mission is to support and advance the criminal defense function by enhancing the quality of defense representation, taking positions on important defense issues, fostering understanding and consensus in areas of mutual concern to defense lawyers and prosecutors, and promoting collegiality among lawyers on both sides and the bench. As *amicus*, the NYCDL offers the Court the perspective of practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

The NYCDL is deeply concerned that the decision of the court below will impair the rights of the accused and all those subject to governmental investigations to a zealous defense by counsel and thereby weaken both the protection of rights and our system of justice. If allowed to stand, the decision could deter attorneys from providing the best legal advice, interfere with the attorney-client relationship, chill zealous advocacy, and erode the protections of the adversarial system.

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[1] Pursuant to Supreme Court Rule 37, *amicus curiae* states that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than the *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief are being submitted herewith.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's interpretation of the federal witness tampering statute casts a chilling shadow over legal representation. The Fifth Circuit's expansive definition of "corruptly persuade" under 18 U.S.C. § 1512(b) as including persuasion "having an improper purpose" to impede the fact-finding of an official proceeding would potentially criminalize a broad range of legitimate attorney advice and appropriately zealous advocacy. Lawyers representing corporations or individuals often give advice or take action designed to protect their client yet impede the fact-finding ability of a government investigation. For example, a lawyer may advise a client to construe vague terms in a subpoena calling for documents narrowly or assert a privilege and refuse to produce documents. A lawyer also might attempt to persuade a government official not to further investigate his client. Yet all of these activities would potentially be crimes under the lower court's decision. If affirmed, this construction of Section 1512(b) would disrupt the careful balance of our adversarial system of justice and imperil the attorney-client relationship.

The right to counsel stands at the center of our system of justice. As this Court has recognized, "sound legal advice or advocacy serves public ends." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Justice is best served when a person subject to an investigation or accused of an offense receives zealous representation from an aggressive advocate. To provide that advice, counsel must be unfettered and able to advance the undivided interests of the client without fear of personal consequences for himself or herself. Through zealous representation of their clients, lawyers secure the rights granted by the Constitution. To do

so, attorneys are taken into their clients' confidences based on an understanding that an attorney acts solely in the client's interest. It is the adversarial nature of our legal system, coupled with the intimate trust established in the attorney-client relationship, that ensures the fair adjudication of disputes.

The Fifth Circuit's definition of "corruptly persuades" in Section 1512(b) as "having an improper purpose" undermines these values. The concern that this interpretation of the statute would render illegal much advice and advocacy by lawyers in governmental investigations, to which the client is entitled, is not allayed by Section 1515(c), which protects "lawful, bona fide, legal representation," but is inherently vague. In its totality, under the Fifth Circuit's construction, the statute would chill the client's right to receive objective unbiased advice by placing the lawyer who advocates an aggressive strategy, but not one who advocates a collaborative strategy, in legal jeopardy. The end product will be an attorney-client relationship racked with doubt and an atmosphere in which outside forces dictate that lawyers dampen their representation. Plainly, this interpretation of Section 1512(b) cannot be correct.

Finally, the "official proceeding" element of Section 1512(b) requires intent to obstruct a *particular* proceeding. To find otherwise would be to create an unreasonable standard in which lawyers could face criminal prosecution for general advice given years before the conflict at issue.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH SIXTH AMENDMENT VALUES

A. An Attorney's Ability To Zealously Represent Her Clients In The Adversarial Process Is Of Paramount Importance To Our Society

The Sixth Amendment to the U.S. Constitution guarantees a defendant the right "to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. Concomitant with that right is a right to an attorney's full and unfettered advice, unconstrained by any conflict of interest. *See United States v. Cronic*, 466 U.S. 648, 657 (1984). More generally, the Constitution imbues lawyers with an integral role in our system of justice. "[I]t is through counsel that all other rights of the accused are protected: 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.'" *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (citation omitted). Attorneys serve as advocates and advisors and play an indispensable role in the protection of individual rights, not only for defendants charged with crimes, but also at earlier stages of a government investigation. *See Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993) (describing the "deprivation of the right to counsel" as a "structural defect"). As Justice Jackson observed:

> [I]t too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society.

Hickman v. Taylor, 329 U.S. 495, 515 (1947) (Jackson, J., concurring).

B. The Fifth Circuit's Definition Of "Corruptly" As "Having An Improper Purpose" Criminalizes Lawful Attorney Activity

The decision below threatens the function of counsel in the adversary system and Sixth Amendment values. The statute used to prosecute Arthur Andersen makes it a crime to "corruptly persuade[] another person, or attempts to do so, . . . with intent to—(1) influence, delay, or prevent the testimony of any person in an official proceeding; (2) cause or induce any person to—(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding; [or] (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(b). In interpreting the language "corruptly persuade," the court below could have joined the D.C. and Third Circuits and held that the statute either requires corrupt means or persuasion to conduct an independently unlawful act. Instead, the court held that it would be satisfied by evidence that one had "an improper purpose," and upheld the district court's instruction that "[a]n improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." Pet. App. 21a-22a. Moreover, the court held that merely being cognizant that any type of investigation or

litigation could arise at some future date on some yet unknown topic would be sufficient to meet the "official proceeding" standard.

This vague and expansive interpretation of Section 1512(b), read in isolation, would subject an attorney to jeopardy for a wide variety of lawful and respected attorney actions, and would threaten to impede the client's ability to receive objective and unfettered advice. An attorney's representation of his client frequently has the practical effect of impeding a government investigation. The defense lawyer's role in an official investigation is to zealously represent his client. Our system of law is founded upon that essential notion that adversarial proceedings best promote the interests of justice. *See Herring v. New York*, 422 U.S. 853, 862 (1975). Every person who is a subject or target of an investigation is entitled to that kind of representation and it is through that representation that truth and justice emerge. As this Court has noted, "[t]he paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question.'" *Penson*, 488 U.S. at 84 (citation omitted).

In providing that kind of representation, an attorney may need to give her client advice that, if followed, would result in testimony, a document, or a record being withheld from an official proceeding or that would result in the testimony of a witness being influenced. That is an attorney's job.

For example:

(1) An attorney in a criminal case may advise her client to invoke her Fifth Amendment right to withhold her testimony from the tribunal;

(2) That same attorney may interview witnesses and present them with documents in an attempt to refresh their recollection and make their testimony more accurate;

(3) The attorney may advise her client to assert his Fourth Amendment rights and withhold documents and records from an investigation if police were to attempt to search a home without a search warrant;

(4) An attorney may advise an unrepresented witness to seek assistance of counsel before speaking with government investigators;

(5) The attorney may also advise a client to refuse to provide testimony in an informal interview by government investigators;

(6) That attorney may also advise a client testifying before the grand jury not to volunteer relevant testimony and to only answer the question asked and not speculate if the right question is not asked;

(7) An attorney may advise a client not to produce a class of documents, or a specific document, that have not been described or identified in a subpoena, even though the attorney recognizes that the documents or document contain information that the investigator would want to see;

(8) An attorney may advise a client to amend a statement to regulators, memos, and press releases to remove content that is unnecessary or to make it more accurate;[2]

(9) An attorney advising his client on the content of SEC filings might suggest that the client delete information that is not specifically required or pertinent but that would be useful to the government;

(10) An attorney may attempt to persuade government officials to cease investigating his client.

These are only a few examples of the circumstances in which an attorney zealously representing a client, could engage in activities on behalf of a client for the purpose of "influenc[ing], delay[ing], or prevent[ing] [a person's] testimony," or could provide advice that would "cause or induce any person to—[ ] withhold testimony, or withhold a record, document, or other object" or "alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(b). In each of these instances, the attorney would be advising the client to take an action that the client had every right to take and that would be in the client's interest or would be advising a witness, or government official, on behalf of the client, to do something that is legal. The citizen is entitled to receive unfettered advice to exercise these rights and to have the attorney advocate his position, and our system of justice demands

[2] In fact, the jury focused on just such advice in deciding this case. *See infra* note 4 and accompanying text.

it. Yet, under the Fifth Circuit's decision, the attorney's conduct in each of these examples would be illegal.

Such an interpretation would also radically shift the balance in the adversarial system to the detriment of both the individual and our system of justice. *See Hickman*, 329 U.S. at 514-15 (Jackson, J., concurring). Moreover, so interpreted, the statute would raise serious constitutional concerns, as clients would be denied their most basic right to counsel. Such an unconstitutional interpretation should be avoided. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (explaining that under the canon of constitutional avoidance, '"the elementary rule is that every reasonable construction must be resorted to, in order to *save* a *statute* from unconstitutionality'") (internal citation omitted); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979); *Hooper v. California*, 155 U.S. 648, 657 (1895).

C. Section 1515(c) Does Not Assuage The Threat Posed By The Fifth Circuit's Decision

The Government might argue that Title 18 U.S.C. § 1515(c) prevents the broad interpretation adopted by the Fifth Circuit from sweeping in attorneys' activities. That provision states: "This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." 18 U.S.C. § 1515(c). It thus excepts from the statute's coverage "the providing of lawful, bona fide, legal representation services." For several reasons, however, that provision does not allay the concerns that the construction

adopted below would criminalize advice and conduct by attorneys acting as zealous advocates.

First, Section 1515(c) itself is plagued with sufficient ambiguity that any attorney who gives advice to withhold evidence or testimony does so, under the Fifth Circuit's interpretation, at her own peril.[3] For example, there is no definition of "lawful" and that term is itself circular. If a lawyer's zealous advocacy of her client may now constitute *unlawful* activity prohibited by Section 1512(b), then Section 1515(c)'s carve-out for *"lawful*, bona fide, legal representation" would provide no comfort at all. *See* Charles W. Wolfram, *Lawyer Crimes: Beyond the Law?*, 36 VAL. U. L. REV. 73, 115 (2001) ("The argument is considerably circular—being based in large part on the requirement that the legal representation be 'lawful.'"). Indeed, the Government, in responding to Arthur Andersen's motion for a new trial, argued that advice from the in-house counsel to change a document constituted fraud and was thus not "lawful" advice under Section 1515(c). *See* Government's Memorandum of Law in Opposition to Andersen's Motion for a Judgment of Acquittal or a New Trial at 22, United States v. Arthur Andersen, LLP (No. 02-0121). *See also United States v. Cueto*, 151 F.3d 620, 631 (7th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999).[4] Likewise, the term

[3] Very few courts have mentioned or interpreted Section 1515(c), and many open questions remain as to the definition of "lawful, bona fide, legal representation." *See United States v. Kloess*, 251 F.3d 941, 944-49 (11th Cir. 2001); *United States v. Kellington*, 217 F.3d 1084, 1098 (9th Cir. 2000); *Blackmon v. Iverson*, 2002 U.S. Dist. LEXIS 18352, at *12 (E.D Pa., Sept. 26, 2002).

[4] Post-verdict press interviews revealed that the jurors had convicted Arthur Andersen not on the basis of the document shredding alleged in the indictment, but instead on the basis of an e-mail from the company's in-house counsel suggesting that a memo be amended to make it more accurate. *See* Mary Flood, *Decision by Jurors Hinged on Memo*, HOUS. CHRON., June 16, 2002, at 1A. In light of this revelation, Arthur Andersen moved for a new trial, arguing in part, that the in-house counsel's advice was protected under 1515(c). *See* Andersen's Motion for Judgment of Acquittal or a New Trial at 7, United States v. Arthur Andersen, L.L.P. (No. 02-0121).

"bona fide" is not self-defining. It could refer to the relationship between the attorney and the individual withholding testimony or evidence; it could refer to the content of the advice and whether it was "bona fide" in the mind of the reviewing court; or it could have some other meaning. An attorney trying to understand her risks in providing advice could only speculate.

Second, attorneys cannot even be sure what activities will be considered "legal representation services." Attorneys represent their clients' interests in a variety of non-traditional forums. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1043 (1991) ("An attorney's duties do not begin inside the courtroom door.") (Kennedy, J., plurality); *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 326-27 (S.D.N.Y. 2003) ("More recently, however, there has been a strong tendency to view the lawyer's role more broadly."). Attorneys are increasingly being hired for both their legal and non-legal skills. For example, an attorney may work with the press or a public relations firm. *See Gentile*, 501 U.S. at 1058 ("[I]n some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts."). In doing so, she may make a statement the government alleges was intended to keep witnesses from stepping forward. Arguably, the statement to the press may not be part of the attorney's "legal" role and the safe harbor would not apply. *See, e.g.*,

In re Grand Jury Subpoenas, 265 F. Supp. 2d at 324-32 (considering whether communication with a public relations firm hired by an attorney on behalf of a criminal defendant is protected by attorney-client privilege). Similarly, a corporate general counsel often makes decisions (*e.g.*, implementing a document retention policy) and takes actions (*e.g.*, serving as Secretary at board meetings) that have multiple legal and business purposes. In each of these circumstances, there is a question whether the conduct of the attorney is "legal representation." Attorneys also are routinely involved in advocating their clients' interests before Congress or in lobbying government agencies.[5] Again, it is unclear whether this constitutes "legal representation."

Third, even if some of these terms might be given definition in a particular factual setting, the statute as a whole would still chill zealous advocacy. Under the Government's interpretation, a person who counsels another to take a lawful step with the object of impeding an investigation has committed a crime, save if a safe harbor applies. But the terms of that safe harbor are themselves ambiguous. It is elementary that a lawyer's representation of his client must be unfettered, *see Herring*, 422 U.S. at 857, and that "a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'" *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981). To ensure

[5] In *United States v. North*, 910 F.2d 843, 882 (D.C. Cir. 1990), the D.C. Circuit specifically held that the word "corruptly" in a similar statute, Section 1503, could not be interpreted to criminalize any intent to influence a proceeding, because such an interpretation would criminalize clearly lawful lobbying activities.

that attorneys are acting in their client's interests, counsel must be independent of outside influences, as the attorney is the only person charged with advancing the client's interests in the adversarial process. *See Wheat v. United States*, 486 U.S. 153, 154-57 (1988); *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980); *Mitchell v. Maggio*, 679 F.2d 77, 78 (5th Cir.), *cert. denied*, 459 U.S. 912 (1982); *United States v. DeFalco*, 644 F.2d 132, 136 (3d Cir. 1980). Courts have consistently held that a lawyer who is subject to prosecution by the office investigating his client cannot provide the client effective assistance of counsel. *See Armienti v. United States*, 234 F.3d 820, 825 (2d Cir. 2000); *United States v. Levy*, 25 F.3d 146, 156-57 (2d Cir. 1994); *DeFalco*, 644 F.2d at 136 (finding "inherent emotional and psychological barriers" to zealous advocacy arising out of prosecution of the attorney); *see also Armienti*, 234 F.3d at 825; Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 353 (1998) ("The mere prospect of being investigated may therefore 'chill' a lawyer from undertaking particular conduct.").[6] That concern is all the more heightened, and the deprivation of the right to counsel the greater, where the prosecutor the attorney is "impeding" on

[6] An attorney threatened with prosecution may be "willing to sacrifice or compromise certain trial strategies and defenses." *Levy*, 25 F.3d at 156. A "lawyer[ ] [may] fail[ ] to conduct further investigation, fail[ ] to vigorously cross-examine the government's witnesses, and fail[ ] to make various objections." *Armienti*, 234 F.3d at 825. Such a situation "may induce the lawyer to pull his punches in defending his client lest the prosecutor's office be angered by an acquittal and retaliate against the lawyer." *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992). "Such retaliation would be unethical; but still the defense lawyer may fear it, at least to the extent of tempering the zeal of his defense of his client somewhat." *Id.* A "lawyer's own criminal investigation [may] cause[ ] him to devote less time to his representation . . . and to be ill-prepared and distracted at trial." *Armienti*, 234 F.3d at 825.

behalf of a client whom the prosecutor is investigating can seek to prosecute the attorney on the basis of the attorney's advice. Under those circumstances, the attorney who gives advice not to cooperate (but not the "cooperative" attorney) would do so at her peril.

Fourth, the safe harbor could be interpreted to be an affirmative defense. *See United States v. Kloess*, 251 F.3d 941, 948 (11th Cir. 2001).[7] If so, an attorney prosecuted for obstruction would bear the burden of pleading the defense as well as the burden of defending himself in court. *See id.* So interpreted, the statutory scheme would result in an ever-present threat of prosecution and a potential tool of harassment. *See, e.g., United States v. Van Engel*, 15 F.3d 623, 629 (7th Cir. 1993), *cert. denied*, 511 U.S. 1142 (1994). Nothing in the safe harbor would stop the prosecutor from hauling the attorney into court.

Fifth, interpreting Section 1512(b) so as to include advice routinely given by lawyers in legal representation would undermine the attorney-client privilege. The Court has repeatedly upheld the importance of the attorney-client privilege. The attorney-client privilege's "purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. at 383, 388 (1981). As this Court explained, "if the purpose of the attorney-client privilege is to be served,

[7] The Eleventh Circuit held that although an attorney bears the burden of pleading the defense, it is the prosecutor that must prove that a lawyer's services were not "lawful, bona fide, and legal." No other circuit has dealt with this issue, and it remains possible that a court could find that an attorney carries the full burden.

the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 393. The privilege, however, belongs to the client, not the attorney, and only the client can waive it. *See Haines v. Liggett Group Inc.*, 975 F.2d 81, 90 (3d Cir. 1992); MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003). Yet, in order to protect himself against a criminal prosecution and prove his defense, the attorney would have to pierce the privilege that is so central to legal representation.

Finally, the Fifth Circuit's expansive interpretation of Section 1512(b) also raises the possibility that prosecutors will use privileged communication divulged by defendants against their defense attorneys and so further chill legal advice. It is not an unfamiliar circumstance in the experience of this organization that a client who is insisting on his innocence will, after he hears the evidence, decide to cooperate with the Government and provide testimony against others. In those circumstances, the more investigations and defendants the cooperator creates the better. The incentive is for the cooperator to provide information, however weak, and to create cases. The Fifth Circuit's decision thus creates the risk that the unscrupulous defendant (the one most frequently in need of legal representation) will at some point turn around and attempt to use his attorney's advice against the attorney. In that event, all that would stand between the attorney and criminal investigation is the judgment of a prosecutor. Under these circumstances, an attorney may think twice

before advising someone to withhold evidence or testimony from an investigation.

D. A Narrower Definition Of "Corruptly Persuade" Would Protect The Adversarial System And The Attorney-Client Relationship

The Fifth Circuit could have avoided all of these problems by more narrowly construing "corruptly persuade." The D.C. and Third Circuits have suggested that "corruptly persuade" should criminalize only (1) those acts of persuasion involving "corrupt" means, e.g. bribery, or (2) acts of persuasion aimed at "corrupting" another to violate an independent legal duty, e.g., persuading someone to commit perjury.[8] Consistent with this interpretation, rather than reading Section 1515(c) as a safe harbor from an otherwise expansive statute, the provision should be read as an interpretative guide or "insurance policy," signaling

[8] *See United States v. Davis*, 183 F.3d 231, 249 (3d Cir. 1999) ("[W]e were confident that bribing someone to withhold information or persuading someone to provide false information would be corrupt persuasion."); *United States v. Farrell*, 126 F.3d 484, 488 (3d Cir. 1997) ("[B]oth attempting to bribe someone to withhold information and attempting to persuade someone to provide false information to federal investigators constitute 'corrupt persuasion' punishable under § 1512(b)."); *United States v. Morrison*, 98 F.3d 619, 630 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1131 (1997) (noting "that the *Poindexter* court expressly approved of an interpretation of § 1505 which outlawed conduct 'corrupting' another person by influencing him *to violate his legal duty*") (internal citation and quotation marks omitted); *United States v. Poindexter*, 951 F.2d 369, 385 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992) (holding that a statute requiring that one act "corruptly" could "constitutionally be applied" to "a person who, for the purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty").

Congress' intent that Section 1512(b) should not be construed in a manner that might prohibit "lawful, bona fide, legal representation" or conduct akin to that.[9] *See United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 520 (1992) (Scalia, J., concurring) (explaining that seemingly redundant provisions "are often meant for insurance, to cover anything the draftsman might inadvertently have omitted in the antecedent catalog; and if the draftsman is good enough, he will have omitted nothing at all"). Most attorney conduct would not constitute a violation of Section 1512(b) even if engaged in by a non-attorney. Section 1515(c) would make clear Congress' intent that such conduct not be criminalized. Such a standard would distinguish between traditionally lawful conduct and true obstruction of justice. It would

[9] Section 1515(c) appears under the heading "Definitions for certain provisions; general provision," 18 U.S.C § 1515, and the statute that added 1515(c) listed the new language under the title "Rule of Construction." Victim and Witness Related Amendments, § 50(b), 100 Stat. 3605 (1986). Accordingly, Section 1515(c) must be understood to define the scope of Section 1512(b), rather than the other way around. Further, the legislative history of Section 1515(c) supports reading it as such an insurance policy. The section was enacted in response to complaints that the obstruction statutes were being used by prosecutors to harass defense attorneys. Section 1515(c) was thus enacted to ensure that Section 1512(b) would not be read to include attorney conduct.

> The Subcommittee on Criminal Justice has received complaints of prosecutor's harassing members of the defense bar. Vigorously and zealously representing a client, however, is not a basis for charging an offense under the obstruction of justice chapter. Section 50(2) therefore amends 18 U.S.C. 1515 to provide specifically that the lawful, bona fide provision of legal representation services does not constitute an offense under any of the obstruction of justice offenses in 18 U.S.C. ch. 73.

132 Cong. Rec. H11291 (Oct. 17, 1986).

protect the traditional role of the attorney and allow attorneys to advise clients of their rights.[10]

Moreover, unlike the Fifth Circuit standard, a standard such as that adopted by the D.C. and Third Circuits provides certainty.[11] Attorneys know that their traditional

[10] This interpretation also has the benefit of eliminating the "surplusage" problem identified by the Third Circuit. The Third Circuit observed that "corruptly persuade," as used in Section 1512(b), "cannot mean simply 'persuades with the intent to hinder communication to law enforcement' because such an interpretation would render the word 'corruptly' meaningless." *Farrell*, 126 F.3d at 487. "[B]ecause the 'improper purposes' that justify the application of § 1512(b) are already expressly described in the statute, construing 'corruptly' to mean merely 'for an improper purpose' (including those described in the statute) renders the term surplusage, a result that we have been admonished to avoid." *Id.* at 490 (citing *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994)).

[11] The D.C. Circuit raised serious concerns that defining "corruptly persuade" as "having an improper purpose" would render the statute unconstitutionally vague. *See Poindexter*, 951 F.2d at 378; *Morrison*, 98 F.3d at 630 (applying *Poindexter* to Section 1512(b)); *see also Davis*, 183 F.3d at 249 ("approv[ing] of *Poindexter*'s reasoning in the § 1512 context"); Pet. App. 19a (admitting that "defining 'corruptly' in terms of improper purpose" casts a "dim light . . . upon its meaning"). The court observed that the word "corruptly" is vague, and that "improper," the word endorsed by the Fifth Circuit, "may be less specific—than 'corrupt.'" *Poindexter*, 951 F.2d at 378-79. Defined that way, Section 1512(b) would be too indeterminate and provide too little notice to pass constitutional muster. *See id.* The Third Circuit also observed that "corruptly" was vague. *See Farrell*, 126 F.3d at 487. That circuit rejected the "having an improper purpose" interpretation, holding that "corruptly persuade," as used in Section 1512(b), "cannot mean simply 'persuades with the intent to hinder communication to law enforcement' because such an interpretation would render the word 'corruptly' meaningless." *Id.*; *see also Davis*, 183 F.3d at 248 ("Simply interfering with the flow of information to the government is not enough to constitute witness tampering."); *supra* note 8.

advice remains lawful and know that the law encourages them to protect their client's interests to the full extent allowed by the law. Confident that their advice and conduct are lawful, attorneys can act as zealous advocates for their clients.

II. THE FIFTH CIRCUIT'S APPROVAL OF AN OVERBROAD DEFINITION OF "OFFICIAL PROCEEDING" ALSO THREATENS TO CRIMINALIZE AND CHILL TRADITIONAL ATTORNEY CONDUCT

The very real threat to attorneys outlined above is further exacerbated by the Fifth Circuit's definition of Section 1512(b)'s "official proceeding" requirement. Section 1512(b) prohibits witness and evidence tampering intended to impact "an official proceeding." The question before the Fifth Circuit was whether a defendant must have some expectation of a *particular* proceeding before he can be guilty of obstruction of justice. Despite finding that the argument for "some limiting sights" on the statute was "not without force," Pet. App. 27a, the Fifth Circuit refused to limit the statute's scope. Instead, it held that there need not be proof that the defendant contemplated that his action would affect a particular official proceeding. Because Section 1512, unlike related obstruction statutes, does not require that the proceeding be pending at the time of the offense, 18 U.S.C. § 1512(f)(1), there is a grave danger that, unless some nexus is required, the statute would be impermissibly broad[12] and would threaten to criminalize traditionally lawful attorney conduct.

[12] In *United States v. Aguilar*, 515 U.S. 593, 599 (1995), this Court held that 18 U.S.C. § 1503, a related obstruction statute, included "a

Under the Fifth Circuit's rubric, even the most general of legal advice would now risk running afoul of Section 1512(b). Without any requirement that a defendant have a particular proceeding in mind, an attorney who provides general legal advice intended to limit her clients' exposure would have exposed a broad range of ordinary attorney conduct, untethered by any temporal constraints, to being construed as criminal obstruction of justice.

A prime example of the uncertainty spread by the Fifth Circuit's decision is the status of document retention policies. Notwithstanding the Fifth Circuit's suggestions to the contrary, *see* Pet. App. 25a, that court's decision renders all document retention policies vulnerable. As attorneys are always aware of the possibility of theoretical government investigations, the advice to adopt a document retention policy could itself be construed as obstruction of justice. Under the Fifth Circuit's theory, a policy adopted years, even decades, before the events leading to an investigation could be the basis for a conviction. In the face of such a possibility, lawyers may cease to advise legal document retention policies, even when they may otherwise be in their clients' best interest.

Congress could not have intended such an uncertain rule. Any reasonable reading of Section 1512(b) must include a requirement that the defendant acts in expectation that a particular proceeding is probable. Anything less risks criminalizing respected attorney conduct.

'nexus' requirement—that the act [ ] have some relationship in time, causation, or logic with the judicial proceedings." The First Circuit and Fifth Circuits, *see United States v. Frankhauser*, 80 F.3d 641, 651 (1st Cir. 1996); *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir.), *cert. denied*, 501 U.S. 1209 (1991), extended this logic to Section 1512(b).

CONCLUSION

Accordingly, the judgment of the court of appeals should be reversed.

February 22, 2005

Respectfully submitted,

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IN THE

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ARTHUR ANDERSEN LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* WASHINGTON LEGAL FOUNDATION AND CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation ("WLF") is a national non-profit public interest law and policy center. WLF devotes substantial resources to litigating cases and filing *amicus* briefs urging rules of law that promote free enterprise and limit government to make it more accountable in all contexts, including criminal law enforcement actions by the Department of Justice. WLF has participated as *amicus* in numerous cases which, like the present one, raise important issues regarding *mens rea* requirements in federal criminal statutes.[1]

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community. The potential criminalization of corporate compliance with document retention policies and with the advice of in-house attorneys concerns the Chamber and many of its members. The broad interpretation of vague, ambiguous criminal statutes to encompass such conduct does not provide the business community with the guidance it needs to comply with the law on the obstruction of justice. *Amici* and their members believe that the Court will benefit from their insight in construing the obstruction of justice statute at issue in this case.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the government charged Arthur Andersen & Co. ("Andersen") with the willful obstruction of justice because Andersen employees, including an in-house lawyer, requested that other employees comply with the Company's legal document retention policy and because an in-house lawyer advised an employee to edit a draft of a memorandum. These events occurred at a time when a formal investigation by the Securities Exchange Commission ("SEC") was possible but far from certain. That charge and ultimate conviction devastated Andersen. Andersen's elimination from the already concentrated field of national accounting firms resulted in the loss of tens of thousands of jobs and caused untold anguish to thousands of individuals adversely affected by this prosecution. While enforcement of the criminal law often has overwhelming consequences for affected persons and industries, its predicate must be a legislative judgment that specified conduct is plainly unlawful. This predicate was not satisfied by the interpretation of the obstruction of justice statute advanced by the United States and embraced by the Fifth Circuit.

The witness tampering statute was amended in 1990 to add the criminal prohibition at issue here. Section 1512(b) of Title 18 criminalizes the knowing, corrupt persuasion of another person to destroy documents with an intent to impair the documents' availability for use in an official proceeding. Although the Fifth Circuit recognized that its interpretation of § 1512(b) cast only a "dim light . . . upon its meaning, its circularity aside," App. 19a, that court nonetheless said that a conviction under this provision simply for persuading another to take a legal action with an improper purpose is permissible. Equating knowing, corrupt persuasion with persuasion for an improper purpose not only results in a statute that is impermissibly vague, but also renders the corruption requirement mere surplusage. Section 1512(b)(2)(B) already expressly requires that the persuasion be intended for the

improper purpose of impairing an official proceeding. Section 1512(b)'s element of knowing, corrupt persuasion should have been interpreted to require that the persuasion was done using an illicit method or that the persuasion involved inducing another to engage in unlawful conduct or that the defendant otherwise knew that the persuasion was unlawful.

The Fifth Circuit's decision is not simply wrong in its particulars. It reflects a fundamental misunderstanding of the governing rules of statutory interpretation for criminal laws. Because § 1512(b) is a criminal statute, under our Constitution, it must be interpreted to provide persons with reasonably clear guidance and notice about what conduct falls within the statute's sweep. See *United States* v. *Kozminski*, 487 U.S. 931 (1988). Here, the generic problem arising from enforcement of a vague criminal law is exacerbated by the fact that § 1512(b) has been interpreted to criminalize a non-coercive request to an employee to comply with a company's lawful document retention policy and an in-house lawyer's recommendations with respect to editing a memorandum. Thus, the federal government purports to criminalize conduct that is part of numerous businesses' everyday routine and that was undertaken without requiring the jury to find any consciousness of wrongdoing. The high profile of this case and the destructive consequences of the conviction together have cast a pall over the administration of routine document retention policies and the conveyance of appropriate legal advice.

Petitioner Andersen clearly explains why the Fifth Circuit's interpretation of § 1512(b) cannot be sustained based on the text, legislative history and purposes of § 1512(b). No purpose would be served by revisiting those points here. In this brief, accordingly, *Amici* focus on the rules of construction governing criminal statutes and their proper role in this case.

First, the rule of lenity resolves the interpretation of ambiguous criminal law statutes in favor of their strict construction. Had that rule been applied to § 1512(b), it would have prevented the fundamentally unfair consequence of the imposition of criminal penalties on Andersen without adequate notice that its conduct was criminal. As this case reflects, the failure to use the rule of lenity to resolve ambiguity concerning a criminal law not only leads to the misinterpretation of criminal statutes and inadequate notice in the rules governing conduct that results in moral condemnation and punishment, but also impedes the administration of justice. Although conflicting interpretations of federal criminal laws may eventually be resolved by this Court; that resolution often gives rise to issues of retroactivity and the applicability of the new rules in habeas proceedings that significantly burden the already overloaded courts.

Second, *Amici* show that the Fifth Circuit's interpretation of the multiple *mens rea* requirements of § 1512(b) is utterly inconsistent with the analytical framework prescribed by the Court. Where, as here, a federal statute criminalizes conduct that is "not inevitably nefarious," *Ratzlaf* v. *United States*, 510 U.S. 135, 144 (1994), this Court consistently construes statutory *mens rea* elements to require either knowledge of the law or knowledge of facts sufficient to render that conduct blameworthy. Instead, the Fifth Circuit adopted a construction that authorized criminal punishment for conduct that a reasonable person would not have understood to be criminal.

Finally, *Amici* show that this case vividly illustrates the damaging consequences of the failure properly to understand and apply the rule of lenity and other interpretive principles that provide society with notice that specified conduct is criminal. There is presently risk and uncertainty in the administration of routine document retention policies and in compliance with legal advice concerning the revision of

internal documents. This uncertainty and risk paralyze and harm the businesses and individuals affected.

ARGUMENT

I. THE DECISION BELOW SUBVERTS THE RULE OF LENITY.

Section § 1512(b) is ambiguous. The Fifth Circuit's interpretation of § 1512(b)'s *mens rea* requirement broadened a conflict between the Third and D.C. Circuits on the one hand, and the Second and Eleventh Circuits on the other. See Pet. 18-26.[2] The existence of a circuit split is not dispositive proof of ambiguity, but the decisions on both sides of the split reveal a consensus that § 1512(b) is inherently ambiguous. See generally Gary G. Grindler & Jason A. Jones, *Please Step Away From the Shredder and the "Delete" Key: §§ 802 and 1002 of the Sarbanes-Oxley Act*, 41 Am. Crim. L. Rev. 67, 74 (2004) ("The meaning of 'corruptly persuades' under § 1512(b) is, unfortunately, perhaps even less certain than the interpretation of the similar language in §§ 1503 and 1505; there is much disagreement between the circuits"). As *Amici* now show, the Fifth Circuit's conclusion – that the ambiguous "knowingly . . . corruptly persuades" language criminalizes the conduct of a defendant who acts with an "improper purpose" – does serious violence to the rule of lenity.

A. The Rule Of Lenity Is A Vital Tool for Construction of Ambiguous Criminal Statutes.

Originating in England during the late seventeenth and early eighteenth centuries to protect individuals from the expansive imposition of the death penalty, see Sarah

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[2] Without expressly resolving the proper interpretation of § 1512(b), the Eighth Circuit has recognized the statute's ambiguity, *United States* v. *Pennington*, 168 F.3d 1060, 1066 (8th Cir. 1999), and the Ninth Circuit has acknowledged the statute's competing interpretations, *United States* v. *Khatami*, 280 F.3d 907, 912-13 (9th Cir. 2002).

Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 Harv. C.R.-C.L. L. Rev. 197, 199-200 (1994), the rule of lenity remains a substantive canon of statutory interpretation essential to guarding individual rights. The rule mandates that courts faced with statutory ambiguity or more than one plausible reading of a criminal statute take the narrowest view. See *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987) ("when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language") (citing cases); cf. 1 William Blackstone, *Commentaries* *92 ("[a] man cannot suffer *more* punishment than the law assigns, but he may suffer *less*"). As explained below, the Fifth Circuit's interpretation of the ambiguous "knowingly . . . corruptly persuades" element of § 1512(b) ignored the rule of lenity and interpreted the provision expansively rather than narrowly.

The foundations of the American rule of lenity were laid in *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820). Chief Justice Marshall, interpreting the Crimes Act of 1790, held that this statute, which granted federal jurisdiction over cases involving manslaughter committed on an American vessel on the "high seas," did not apply to cases involving manslaughter committed on a vessel docked on a river in China. The Court strictly construed the statute, stating:

> The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment. [*Id.* at 95.]

See *id.* at 105 (in the absence of Congressional action "this Court cannot enlarge the statute").

Following *Wiltberger*'s teaching, strict construction of criminal statutes became the governing canon within United States courts. For example, in *United States* v. *Lacher*, 134 U.S. 624, 628 (1890), the Court held that "before a man can be punished, his case must be plainly and unmistakably within the statute." See also *Ladner* v. *United States*, 358 U.S. 169, 178 (1958) ("[T]he Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended"); *Bell* v. *United States*, 349 U.S. 81, 83 (1955) (Frankfurter, J.) (it is "a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a higher punishment").

This Court has set forth two primary reasons for the rule of lenity: ensuring legislative supremacy and providing proper notice to the public of what conduct is criminal. In *Wiltberger*, Chief Justice Marshall emphasized that the rule was intended to guarantee legislative supremacy in the establishment of criminal law. See 18 U.S. (5 Wheat.) at 95-97, 105-06. This Court later explained that "'because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.'" *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in Benchmarks* 196, 209 (1967)). Cf. *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (the most important aspect of the prohibition of vague criminal statutes is "the requirement that a legislature establish minimal guidelines to govern law enforcement") (internal quotation marks and citation omitted).[3]

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[3] In this manner, the rule of lenity serves as a companion to the doctrine of constitutional doubt in effectuating the intent of the legislature and avoiding the creation of constitutional peril through broad interpretation of ambiguous language. *Cf. Clark* v. *Suarez Martinez*, 125 S. Ct. 716, 724 (2005) (discussing lenity in the same context as constitutional avoidance);

This Court has also elaborated on the rule's role in ensuring that the public is provided with adequate notice of the standards governing conduct and for imposing criminal punishments. Justice Holmes, writing for the Court in *McBoyle* v. *United States*, 283 U.S. 25 (1931), stated:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that fair warning should be given to the world in language that the common world will understand .... To make the warning fair, so far as possible the line should be clear. [*Id.* at 27.]

Accord Bass, 404 U.S. at 347-49. Thus, the rule of lenity is among the "[s]ound principles of statutory construction [which] lead [the Court] to reject the amorphous definitions" that create room for arbitrary and unfair decisions by allowing judges to develop standards of criminal punishment on a case-by-case basis. *Kozminski*, 487 U.S. at 951.

The rule of lenity also plays a critical role in constraining prosecutorial discretion. Vigorous application of the rule will deter prosecutors from stretching criminal statutes to fit conduct the prosecutor finds personally offensive. Sadly, it is too late to spare Andersen and all of its employees. But reversal of the conviction will protect future targets of excessive prosecutorial zeal.

This Court's jurisprudence continues to make the rule of lenity the determining principle of construction when the text, structure and legislative history of a criminal statute are ambiguous about its meaning and application. Most recently in *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), the Court again stated that "'when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.'" *Id.* at 409

Almendarez-Torres v. *United States*, 523 U.S. 224, 270-71 (1998) (Scalia, J., dissenting).

(alteration omitted) (quoting *McNally*, 483 U.S. at 359-60). See also *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) ("where text, structure, and history fail to establish that the Government's position is unambiguously correct[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor") (citing *Bass*, 404 U.S. at 347-49); *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) (when "ambiguity survives," the court "choose[s] the construction yielding the shorter sentence by resting on the venerable theory of lenity"); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (the rule of lenity applies where the text, structure and history of the statute leave reasonable doubt about the statute's intended scope).[4]

As we show *infra*, the rule of lenity applies in this case and should have guided all courts of appeals to a strict construction of § 1512(b). Indeed, once the Fifth Circuit acknowledged that defining "'knowingly ... corruptly' in terms of improper purpose" is "circular[]" and casts only "dim light" upon its meaning and that other tools of statutory guidance did not resolve § 1512(b)'s ambiguity, App. 19a, that court should have applied the rule of lenity and concluded that the statute did not criminalize Andersen's actions in this case.

[4] There is a debate among justices of this Court concerning whether the rule of lenity applies whenever statutory text is ambiguous or only in "situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal*, 498 U.S. at 108 (quoting *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980)). *See id.* at 131-32 (Scalia, J., dissenting) (debating the majority's characterization of the rule); *R.L.C.*, 503 U.S. at 308 (Scalia, J., concurring in part and in the judgment) (the Court's "treatment of 'the venerable rule of lenity,' does not venerate the important values the old rule serves") (internal citation omitted). This debate is irrelevant here. The statute is ambiguous before and after application of all traditional tools of statutory construction so the rule of lenity applies under all justices' views.

B. Because § 1512(b) Is Ambiguous, The Rule Of Lenity Applies.

Section 1512's text is hopelessly ambiguous. The legislative history and other aids to construction are as vague as the text. This is precisely the situation in which a court should apply the rule of lenity, as the Third and D.C. Circuits have done. The Fifth Circuit's failure to apply the rule of lenity and reverse the conviction was erroneous.

In *United States* v. *Farrell*, 126 F.3d 484 (3d Cir. 1997), the Third Circuit properly applied the rule of lenity in its construction of § 1512(b). That court reversed a defendant's conviction under § 1512(b) for "knowingly . . . corruptly persuading" a witness to withhold information from the Department of Agriculture. The court found "the phrase 'corruptly persuades' to be ambiguous," *id.* at 487, concluding that the meaning of "corruptly" was not discernible "from the face of the statute," the legislative history, or other statutes prohibiting obstruction of justice generally, *id.* at 487-90.

The government proposed that § 1512's "knowingly . . . corruptly" element should be read to require only an "improper purpose," a definition used in some of cases interpreting the *mens rea* element of § 1503. The court, however, flatly rejected the argument that "knowingly . . . corruptly" means "'motivated by an improper purpose'" under § 1512(b). *Id.* at 489-90. The Third Circuit reasoned that § 1512(b)'s "knowing" element and specific intent requirement rendered the government's proposed construction of "corruptly" superfluous. *Id.* at 490 ("because the 'improper purposes' that justify the application of § 1512(b) are already expressly described in the statute, construing 'corruptly' to mean merely 'for an improper purpose' . . . renders the term surplusage, a result that we have been admonished to avoid"). The court concluded that even if other more expansive readings of § 1512 were reasonable, the

rule of lenity demanded a strict construction of the statute. *Id.* at 489 (citing cases).[5]

Similarly, in *United States* v. *Poindexter*, 951 F.2d 369 (1991), the D.C. Circuit held that the word "corruptly," as used in the former § 1505, "on its face . . . is vague; that is, in the absence of some narrowing gloss, people must 'guess at its meaning and differ as to its application.'" *Id.* at 378 (quoting *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926)). The court explained that "corruptly" has both a transitive and intransitive meaning, the former involving the persuasion of another by means of corruption or bribery while the latter involves persuading wickedly or immorally, that is, with a bad motive. *Id.* The court adopted the transitive meaning to avoid unconstitutional vagueness and concluded that even that reading "would still be unconstitutionally vague" without the additional requirement that the defendant's conduct violate a "legal duty." *Id.* at 379 (emphasis omitted). Further, the court found that the text failed to satisfy the notice rationale for the rule of lenity set forth in *Bass*, 404 U.S. at 348. See 951 F.2d at 386 ("neither the legislative history nor the prior judicial interpretation of § 1505 supplies the constitutionally required notice that the statute on its face lacks").[6]

In contrast, the Fifth Circuit broadly interpreted § 1512(b)'s ambiguous text and legislative history, embracing the harsher of two readings of a criminal statute although neither

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[5] In *United States* v. *Davis*, 183 F.3d 231 (3d Cir.), *amended by* 197 F.3d 662 (3d Cir. 1999), the Third Circuit revisited the meaning of "'corrupt persuasion'" in § 1512, and again expressly recognized that a jury instruction defining "corruptly" as "'having improper motive or purpose'" was erroneous. 183 F.3d at 250 & n.6.

[6] After *Poindexter*, Congress amended § 1515 to redefine "corruptly" as used in § 1505. *See* Pet. 18 n.19. The amendment provided "the term 'corruptly' means acting with an improper purpose." 18 U.S.C. § 1515(b). Congress conspicuously applied that new definition *only* to § 1505, notwithstanding that §§ 1503 and 1512 also use "corruptly."

Congress's language nor its legislative history were "clear" or "definite." *McNally*, 483 U.S. at 359-60. With respect to § 1512(b)'s text, the court "defin[ed] 'corruptly' in terms of improper purpose," even though it forthrightly acknowledged "*the dim light [that definition] casts upon its meaning, its circularity aside*." App. 19a (emphasis supplied). And, the Fifth Circuit did not conclude that the legislative history clearly dictated its interpretation of "knowingly . . . corruptly persuades," but instead opined that "defining 'corruptly' as 'motivated by an improper purpose' *comports easily* with the legislative history." *Id.* at 23a (emphasis supplied). This analysis reveals the court's erroneous understanding of the rule of lenity. That rule requires a *restrictive interpretation* of a statute whose text and legislative history leave its meaning unclear. The fact that the legislative history is consistent with an interpretation of text that itself casts only a "dim light" on the statute's meaning cannot justify the court's failure to apply the rule of lenity.

Like the Fifth Circuit, the other circuits interpreting § 1512(b) expansively have acknowledged that the section's "knowingly . . . corruptly" language is not clear-cut. In *United States* v. *Thompson*, 76 F.3d 442, 452 (2d Cir. 1996), and *United States* v. *Shotts*, 145 F.3d 1289, 1300-01 (11th Cir. 1998), the Second and Eleventh Circuits rejected arguments that § 1512(b) was vague. In so doing, they relied on § 1512's legislative history. See, *e.g.*, *Shotts*, 145 F.3d at 1300-01 (relying on *Farrell*, 126 F.3d at 492 (Campbell, J., dissenting)). The legislative history, however, is wholly indeterminate. Senator Biden's remarks relating to "knowing[] . . . corrupt persuasion" account for a few paragraphs in a lengthy section-by-section analysis of the Anti-Drug Abuse Act of 1988, and reveal only that the "knowingly . . . corruptly persuades" language was intended to overrule a Second Circuit case and ensure that bribing witnesses or persuading witnesses to commit perjury could be prosecuted under federal law. See 134 Cong. Rec. 32701 (1988).

Indeed, the definitional language introduced by the House Report, and enacted as § 1515(a)(6), merely states the "term 'corruptly persuades' does not include conduct that is not 'misleading conduct' because a state of mind required for 'misleading conduct' is lacking." H.R. Rep. No. 100-169, at 12-13 (1987); *id.* at 13 n.27; see also 18 U.S.C. § 1515(a)(6) (implementing House language and defining "knowingly . . . corruptly persuades" as used in §§ 1512 and 1513). Nowhere does the legislative history of § 1512 equate "knowingly . . . corruptly" with an "improper purpose," or cite any cases applying the *mens rea* element in those terms.[7]

In the decision below, the Fifth Circuit's "statutory inflation" of § 1512(b) "raise[s] concerns about both legislative primacy and due process." Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 Wm. & Mary L. Rev. 2209, 2262 (2003). Congress enacted a *mens rea* requirement of "knowing" and "corrupt" persuasion, as well as the improper purpose of interfering with a proceeding. By failing to give the requirement of "corrupt" persuasion any content – let alone content more demanding than knowing persuasion – the Fifth Circuit authorized a prosecution not contemplated by the legislature and adopted a statutory interpretation that contravenes the rule of lenity.

C. The Application Of The Rule Of Lenity In This Case Fully Serves Its Important Purposes And The Administration Of Justice.

The application of the rule of lenity here would serve the administration of justice.

First, the law must give notice of what conduct may be punished by criminal sanction. As this Court has explained,

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[7] Not a single case cited in Senator Biden's discussion of "corrupt persuasion" mentions the phrase "improper purpose." *See* 134 Cong. Rec. at 32701 (citing cases); *cf.* Pet. 23 n.23 (discussing the cases' nexus to wrongful acts).

"'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'" *Bass*, 404 U.S. at 348 (quoting *McBoyle*, 283 U.S. at 27). If a criminal law is ambiguous, it does not give fair warning unless it is strictly construed to resolve the ambiguity in the defendant's favor. Only then does the statute provide sufficient notice of the conduct being criminalized.

Clear notice is particularly important when a statute criminalizes conduct that is an integral part of numerous businesses' daily routine. Here, Andersen was convicted of a crime based on an instruction to adhere to the Company's document retention policy and in-house counsel's advice to edit a memorandum at a time when no formal SEC investigation was pending. Had the rule of lenity been applied to § 1512(b), and particularly to its *mens rea* requirements, the statute's ambiguities would have been resolved in favor of a heightened *mens rea* requirement.

Second, as Justice Scalia has noted, the rule of lenity, properly understood and applied, should prevent the fundamental unfairness resulting from circuit splits about the interpretation of federal criminal statutes. See *Bryan* v. *United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting). If the courts of appeals faithfully applied the rule when ordinary tools of statutory construction resulted in a conclusion that the statute was ambiguous, there would be far fewer differing interpretations of criminal statutes.

Moreover, without the rule of lenity as a tie-breaker in construing ambiguous statutes, the enforcement of such laws sews trouble, confusion and an increased caseload for courts in the future. As Justice Scalia has observed:

> In our era of multiplying new federal crimes, there is more reason than ever to give this ancient canon of construction [the rule of lenity] consistent application:

> by fostering uniformity in the interpretation of criminal statutes, it will reduce the occasions on which this Court will have to produce judicial havoc by resolving in defendants' favor a Circuit conflict regarding the substantive elements of a federal crime. [*Bryan*, 524 U.S. at 205 (citing *Bousley* v. *United States*, 523 U.S. 614 (1998))].

In *Bousley* the Court had to sort out the consequences of *Bailey* v. *United States*, 516 U.S. 137 (1995), which resolved a circuit split about the meaning of the prohibition on the "use or carry[ing]" of a firearm in the commission of a crime. Once the Court resolved that issue, substantial additional litigation ensued concerning retroactivity. This Court ultimately heard *Bousley* to resolve a circuit split involving hundreds of habeas petitions over whether defendants who pled guilty could raise *Bailey* challenges on habeas corpus review. The Court held such challenges were available on habeas if defendants could show "'actual innocence.'" 523 U.S. at 623-24. This also happened in *McNally* where the Court's decision altered an element of the criminal offense, and thus applied retroactively. More than 200 former government officials had their convictions overturned. Many lives had already been ruined.

Bousley and *McNally* effectively illustrate the profound rippling effect and additional work generated when courts interpret ambiguous criminal statutes without the presumption mandated by the rule of lenity. Once the meaning of the statute is determined, courts, defendants and prosecutors pay the price for the period of uncertainly caused by the failure to apply the rule of lenity. Because a defendant convicted by a jury that has been erroneously instructed on an element of a criminal offense can often plausibly plead actual innocence, the resolution of a circuit split may give rise to substantial issues related to the issuance of a writ of habeas corpus. The same result would attach to a reversal here, because the definition of a crime under § 1512(b) would be fundamentally

altered by a heightened *mens rea* requirement (this case would not, however, give rise to the thousands of habeas petitions resulting from *Bailey* because many fewer prosecutions occur under § 1512(b)).

In sum, the proper application of the rule of lenity to ambiguous criminal statutes could prevent the harmful consequences resulting from conflicting interpretations of a criminal statute, not only for the defendants swept in by overbroad and inconsistent interpretations but also for the judiciary whose caseload is multiplied. Section 1512(b) should be strictly construed to exclude Andersen's conduct.

II. SECTION 1512(b) SHOULD NOT BE INTERPRETED TO CRIMINALIZE CONDUCT THAT A REASONABLE PERSON WOULD NOT UNDERSTAND TO BE CRIMINAL.

The maxim "ignorance of the law will not excuse," *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 68 (1910), and the criminal law's "ancient requirement of a culpable state of mind," *Morissette* v. *United States*, 342 U.S. 246, 250 (1952), are often in tension. That tension is heightened when a defendant is prosecuted under a statute criminalizing acts not generally understood to be immoral or criminal – *viz.*, crimes that are *mala prohibitum*.[8] In a series of cases, this Court has resolved that tension by recognizing that ignorance of the law in fact may be a valid excuse *if the law itself makes knowledge of the law an element of the offense*, and by interpreting the *mens rea* elements of crimes that are *mala prohibitum* to require that the defendant know that his or her conduct was unlawful.

This interpretive approach to *mala prohibitum* offenses reflects a background presumption that culpability should be

[8] *Malum prohibitum* refers to "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." *Black's Law Dictionary* 978 (8th ed. 2004).

required for criminal punishment in that setting. It resembles the rule of lenity – indeed, it probably is no more than a particular application of the rule of lenity – because it results in a more demanding *mens rea* requirement for criminal laws addressing conduct not generally understood to be criminal. See Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 Emory L.J. 753, 864 n.463 (2002) ("[c]onstruing mens rea terms in the defendant's favor is a form of leniency, and it serves conceptual clarity to call it such").[9] As we show *infra*, this is the framework that should have been utilized by the Fifth Circuit in interpreting § 1512(b).

Instead, the Fifth Circuit constructively applied the maxim "ignorance of the law is no excuse." The lower court failed to recognize that, although this maxim continues to hold sway in interpreting statutes criminalizing conduct that is *malum in se* and in interpreting so-called public welfare statutes, the *mens rea* requirements of statutes such as § 1512(b), which criminalize at least some conduct that is not inherently culpable are generally interpreted to require a defendant to know that he or she is acting unlawfully.

[9] This Court has recognized that interpreting statutes involving conduct that is *malum prohibitum* to require a heightened *mens rea* is interrelated with the rule of lenity. *See Ratzlaf*, 510 U.S. at 146-49 (requiring showing of *mens rea* in tandem with application of rule of lenity); *Liparota* v. *United States*, 471 U.S. 419, 426-28 (1985) ("requiring mens rea is in keeping with our longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'"); *cf. Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994) (finding it unnecessary to apply rule of lenity because common law requirement of *mens rea* governed statutory interpretation); *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality opinion) (proper to apply the rule of lenity to a civil statute whose criminal applications carry no willfulness requirement)

A. Ignorance Of The Law Does Excuse Crimes That Are *Mala Prohibitum* Where Knowledge Of The Law Is An Element Of The Crime.

Seeking to uphold the Fifth Circuit's interpretation of § 1512(b)'s *mens rea* requirements, the government relies heavily on the axiom that "'ignorance of the law is no defense.'" See Cert. Opp'n at 11, 22-24. That maxim has no application here. Section 1512(b) criminalizes conduct that a reasonable person would not understand to be criminal; thus, under this Court's precedent, § 1512(b)'s *mens rea* requirements should be interpreted to make a defendant's knowledge that he or she is engaged in unlawful conduct an element of the crime.

In *Barlow* v. *United States*, 32 U.S. (7 Pet.) 404, 411 (1833), Justice Story stated, "[i]t is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." But, there have always been exceptions to this general rule. See Vera Bolgár, *The Present Function of the Maxim Ignorantia Juris Neminem Excusat – A Comparative Study*, 52 Iowa L. Rev. 626, 630 (1967). Indeed, "the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element." Model Penal Code § 2.02, cmt. 131 (Tent. Draft No. 4, 1955), *quoted in United States* v. *Freed*, 401 U.S. 601, 615 n.6 (1971) (Brennan, J., concurring).

Thus, ignorance of the law does not excuse crimes that are *mala in se*, because the individual's evil or vicious mind is inherent in the commission of the crime itself.[10] For these

[10] According to Blackstone, *mala in se* are "crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled *mala in se* [crimes in themselves], such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature." 1 William Blackstone, *Commentaries* *54. *See also* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 413 (1958) ("[A]lmost everyone is aware that murder and forcible rape and the obvious forms of theft are wrong. But in any event, knowledge of wrongfulness can fairly be assumed. For any member of the community who does these things without knowing that they are criminal is blameworthy, as much for his lack of knowledge as for his actual conduct").

common law crimes, the notion of ignorance would be flatly contrary to the moral certainty of the wrong. Cf. *Cheek* v. *United States*, 498 U.S. 192, 199 (1991) ("Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law").

In addition, this Court has held that ignorance of the law does not excuse a subset of crimes that are *mala prohibitum* – the so-called public welfare offenses characterized by their relatively small penalties and regulatory focus. See, *e.g.*, *Barlow*, 32 U.S. at 411; *Shevlin-Carpenter Co.*, 218 U.S. at 68-69; *United States* v. *International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971); *Freed*, 401 U.S. at 608-09. The Court explained that ignorance is typically not a defense "in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*." *United States* v. *Balint*, 258 U.S. 250, 252 (1922).

In *United States* v. *U.S. Gypsum, Co.*, 438 U.S. 422 (1978) (plurality opinion), however, the Court strongly indicated that the category of public welfare offenses in which strict liability would be inferred was extremely narrow. Citing these cases, the Court acknowledged that "strict-liability offenses are not unknown to the criminal law," but emphasized that "the limited circumstances in which Congress has created and this Court has recognized such offenses attest to their generally disfavored status." *Id.* at 437-38 (internal citations omitted). Significantly, the Court observed that the line between routine, acceptable business conduct and criminal conduct is

difficult to discern under the Sherman Act, rejected strict liability for criminal violations of the Act (despite the absence of any *mens rea* element), and interpreted the Act to impose the traditional criminal *mens rea* of a knowing violation of the law. *Id.* at 435-36. See also *Hanousek* v. *United States*, 528 U.S. 1102, 1104 (2000) (Thomas, J., dissenting from denial of certiorari) ("[t]he seriousness of the[] penalties [under the Clean Water Act] counsel against concluding that the CWA can accurately be classified as a public welfare statute").

In marked contrast and of vital importance here, ignorance of the law *does* excuse offenses that are *mala prohibitum*, that is, where a statute criminalizes conduct that is "not inevitably nefarious." *Ratzlaf*, 510 U.S. at 144. See generally John Shepard Wiley, Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 Va. L. Rev. 1021 (1999) (discussing this Court's cases reflecting what the author terms "the rule of mandatory culpability"). In a line of cases commencing with *Morissette* and culminating in *Bryan*, this Court has consistently construed *mens rea* elements in such statutes to require knowledge that the conduct at issue is unlawful. This is done in two ways. If knowledge of certain historical facts is sufficient to render conduct blameworthy, the *mens rea* elements of the statute are construed to require knowledge of such facts. See *infra* at 20-21 (discussing *Morissette* and *Staples*). But where, as here, knowledge of historical facts does *not* put a reasonable person on notice that his or her behavior is criminal, the *mens rea* elements of the statute are interpreted to require knowledge of the law. See *infra* at 22-23 (discussing *Liparota*, *Cheek*, *Ratzlof*, and *Bryan*).

In *Morissette*, a defendant who salvaged spent bomb casings from a vacant plot of land was indicted and convicted of "'knowingly . . . covert[ing]' [government] property." 342 U.S. at 248 (quoting 18 U.S.C. § 641). Believing that the casings were abandoned, the defendant argued that he had no criminal intent, but the trial court refused to allow him to present his claimed innocent intent to the jury. See *id.* at 248-49. On review, this Court rejected the government's argument that Congress intended to criminalize even unwitting conversions, holding that the "knowing" element of the crime required the prosecution to prove that the defendant "had knowledge of the facts, though not necessarily the law, that made the taking a conversion." *Id.* at 271. Describing the public welfare cases as rare exceptions to the general rule that crime requires an "evil-meaning mind" and an "evil-doing hand," *id.* at 251-54, 257-63, Justice Jackson's majority opinion stated:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. [*Id.* at 250.]

Accordingly, the Court interpreted the explicit statutory *mens rea* element of knowing conversion to require knowledge of the facts making the conversion of property unlawful. *Id.* at 275.

The Court utilized the same analytical framework in construing the *mens rea* element in the National Firearms Act, which prohibits receipt or possession of an automatic weapon. Despite the absence of any scienter requirement, the Court reasoned that because the Act did not govern public welfare and because severe penalties were attached to its violation, the government was required to prove that the defendant knew of the features of the weapon that brought it within the scope of the Act. *Staples* v. *United States*, 511 U.S. 600, 606-07, 619 (1994). See also *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) (holding "knowingly" requirement applied to each phrase of the Protection of Children Against Sexual Exploitation Act, and stating, "*Morissette*, reinforced by *Staples*, instructs that the presumption in favor

of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct").

In *Liparota* v. *United States*, 471 U.S. 419, 433-34 (1985), the Court extended this framework by interpreting the *mens rea* element "knowingly" to require knowledge that one's conduct violated the law. In *Liparota*, the federal law penalized anyone who "knowingly" acquired food stamp coupons in a manner not authorized by regulations; Liparota argued that he did not know he had done anything wrong by accepting food stamps in exchange for a discounted amount of cash, *i.e.*, that he was not "morally blameworthy." *Id.* at 423. This Court construed the *mens rea* element to require proof that the defendant "knew that his conduct was unauthorized or illegal," *id.* at 434, thereby accepting ignorance of the law as an excuse. See also *Cheek*, 498 U.S. at 202-04 (interpreting *mens rea* element of "willfully" attempting to evade a tax to require proof of an intentional violation of a known legal duty).

More recently, in *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), the Court construed the *mens rea* element of willfulness in the Money Laundering Control Act's provision outlawing the "structuring" of cash transactions with banks into amounts smaller than $10,000 in order to prevent a bank from reporting the transaction. A defendant attempted to pay a gambling debt by purchasing cashier's checks for less than $10,000 from several, different banks. Concluding that structuring is not "so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement is satisfied irrespective of defendant's knowledge," *id.* at 146 – *viz.*, that structuring is *malum prohibitum* – the Court held that a willful violation of the anti-structuring law occurred only if "the Government . . . prove[d] that the defendant acted with knowledge that his conduct was unlawful." *Id.* at 137, 149 (by using the term "willful," Congress "decree[d]" that ignorance of the law is a defense to a criminal charge).

Finally, in *Bryan* v. *United States*, 524 U.S. 184, 196-98 (1998), the Court held that in order "willfully" to violate the federal licensing requirement for firearms dealers, the government must show that defendant knew his or her conduct was unlawful. Again, the Court construed the statute to provide that a person commits a crime only if he or she acts with consciousness of wrongdoing.

Together *Liparota*, *Cheek*, *Ratzlaf*, and *Bryan* stand for the proposition that where, as here, a federal statute criminalizes acts that are not inherently nefarious, the *mens rea* element of the statutes will be interpreted to require the government to prove that the defendant knew that his conduct was unlawful. By this process of interpretation, ignorance of the law has become an excuse in such a setting. Cf. Wiley, *supra*, at 1045 (discussing the Court's shift toward a culpability requirement and stating "the *Liparota* and *Ratzlaf* decisions are more remarkable than the other cases [*Staples* and *X-Citement Video*] because they break with the historic rule that 'ignorance of the law is no defense' and then go further by requiring neither official reliance nor that the defendant bear the burden of proof"). In this line of cases, the rule that ignorance of the law does not excuse is secondary to the equally critical principle that the "existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Staples*, 511 U.S. at 605 (internal quotation marks omitted). Cf. *Smith* v. *Wade*, 461 U.S. 30, 69 (1983) (Rehnquist, J., dissenting) ("'There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal. . . . It is therefore the principal of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist'") (omission in original) (quoting 1 J. Bishop, *Criminal Law* §§ 285-287 (5th ed. 1872)).

B. Section 1512(b)'s *Mens Rea* Elements Should Be Interpreted To Require The Prosecution To Prove That A Defendant Knows Its Conduct Is Unlawful.

Neither one employee's request to another to observe the Company's legal document retention policy nor in-house counsel's advice to an employee to edit a memorandum could remotely be characterized as either *malum in se* or a public welfare offense. The conduct that § 1512(b) is alleged to criminalize here is not inherently dangerous, nor does it demonstrate an evil or guilty mind. Indeed, far from being inherently culpable, document destruction – or advice regarding destruction – is often socially beneficial. See Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 Fordham J. Corp. & Fin. L. 721, 721, 724-25 (2003) (discussing benefits of document retention policies); Steven R. Schoenfeld & Rosena P. Rasalingam, *Document Retention Policies Have Long-Term Benefits*, N.Y.L.J., Nov. 18, 2002, at S5 (stating document retention policies "save money" and "facilitate the company's business operations and preserve the company's valuable information assets").

In addition, the penalties for violation of § 1512(b), which authorizes a ten-year term of imprisonment, are too severe and substantial to characterize it as a law regulating public welfare. See *Staples*, 511 U.S. at 616-18 (public welfare offenses typically involve small penalties); Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 72 (1933) (the "cardinal principle[]" of public welfare offenses is that the penalty may not be severe).

Accordingly, § 1512(b) criminalizes conduct that is *malum prohibitum* – unlawful solely by virtue of the statute. As a result, under this Court's precedent set forth above, § 1512(b)'s ambiguous *mens rea* elements – that the defendant "knowingly . . . *corruptly persuade*" another person "*with intent* to . . . alter, destroy, mutilate, or conceal an

object *with intent* to impair the object's integrity or availability for use in an official proceeding," 18 U.S.C. § 1512(b)(2)(B) (emphasis added) – should be interpreted to require the defendant to know that his or her conduct was unlawful. Neither the trial court's instructions to the jury nor the Fifth Circuit's interpretation of the statute imposed this requirement. See Pet. App. 24a-25a, 29a, 41a (Fifth Circuit); *id.* at 47a-49a (jury instructions). The Fifth Circuit wrongly concluded that defendant's ignorance of wrongdoing would be no excuse for its acts even though, under this Court's precedents, § 1512(b)'s multiple *mens rea* elements required the prosecution to show that that Andersen knew its conduct was unlawful.

It was only by failing to heed the relevant precedents that the court below was able to construe § 1512(b) to criminalize conduct that was not inherently evil and that a reasonable person would not have understood was unlawful.

III. THE DECISION BELOW HAS SUBSTANTIAL DAMAGING IMPLICATIONS FOR THE ECONOMY AND INDIVIDUALS.

A. The Decision Below Criminalizes Supervision Of Legal Conduct And Creates Uncertainty And Inefficiency.

This was a high profile prosecution that destroyed a venerable business and many professional careers. The legal message that this prosecution sent has not been lost on businesses and individuals. If a company or executive has any basis to believe that a formal government investigation may be commenced at some point in the future, compliance with a lawful document retention policy or the advice of counsel with respect to edits to draft documents poses a serious risk of criminal prosecution. For large institutions this risk weighs heavily on their day-to-day decisions and activities. It is difficult enough to compete in a global market

place without having ordinary conduct take on a criminal risk simply because there is an inquiry in the air.

Criminal penalties are reserved for the most egregious conduct; moreover, unlike civil law penalties, criminal sanctions typically apply only to that conduct which society views as unambiguously wrongful. The Fifth Circuit's reading of § 1512(b) in this case, however, criminalizes conduct that was believed to be lawful and that consisted of reminding a subordinate to engage in wholly lawful conduct and providing legal advice to a client concerning the content of a memorandum. See Steven Lubet, *Document Destruction After Arthur Andersen: Is It Still Housekeeping or Is It A Crime?*, 4 J. App. Prac. & Process 323 (2002); Stephen Gillers, *The Flaw In The Andersen Verdict*, N.Y. Times, June 18, 2002, at A23 (explaining that in-house counsel's memorandum was "bona fide legal advice to a client who was writing a standard file memo, the kind of advice lawyers routinely give").

At the time of Andersen's alleged obstruction of justice, it was lawful and economically beneficial for Andersen to maintain a document retention policy and for Andersen employees to destroy documents in compliance with that policy. See Chase, *supra*, at 721, 724-25 (discussing benefits of document retention policies); Schoenfeld & Rasalingam, *supra*, at S5 (same). It was also lawful for a supervisor who discovered that employees were not complying with the document retention policy to destroy the documents him or herself. Under the Fifth Circuit's rule, however, it was illegal for that supervisor to suggest that employees observe the document retention policy if one object of the suggestion was to impede some future fact-finding by the government. This pushes an already severe form of vicarious corporate liability to an extreme. It is difficult to conceive of another area of the criminal law in which two individuals have precisely the same *mens rea*, and the one who acts commits no crime, but

the one who merely suggests the act is deemed to have engaged in illegal conduct.[11]

The effects of this anomalous situation are severe for businesses and individuals. Companies and employees will be consumed by inefficient caution. If an official investigation even approaches the horizon, it will become impossible as a practical matter for a company to advise its employees to comply with its efficient and legal document retention policy for fear of running afoul of the law. In a company with thousands of employees which generates millions of paper documents and hundreds of millions of electronic documents, such an approach is at least onerous. For a small business, where space limitations, storage costs, and legal advice are relatively more burdensome, such a rule can be devastating. If Congress wants to impose those burdens and to criminalize failure to act in accordance with a federal rule of document retention, then it should do so expressly and unambiguously. Absent that, prosecutors should not be invested with a roving commission to stretch criminal law to fit conduct not clearly prohibited. Only a faithful and consistent use of the rule of lenity and related interpretive principles regarding crimes that are not *mala in se* can prevent the kind of needless harm that the prosecution in this case created.

B. The Conviction Of Andersen And Others Under Amorphous Standards Inflicts Significant Damage On The Economy.

Instead of prosecuting individual actors, the United States chose to prosecute Andersen, allowing the jury to spread blame for the actions of a few across a corporate structure. By holding that Andersen violated § 1512(b), even though its

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[11] An analogous critique could be offered with respect to criminalizing the in-house attorney's legal advice to edit a company memorandum, but *Amici* incorporate the analysis of the National Association of Criminal Defense Lawyers to avoid repetition.

document retention policy and its compliance with legal advice were lawful, the prosecution was able to conflate legal and illegal acts, ultimately allowing the jury to punish a faceless corporation.

Multiple commentators opined that in the aftermath of Enron's collapse, government prosecutors were under intense pressure to obtain a symbolic conviction or find a scapegoat, and thus turned to Andersen because of the perceived ease in prosecuting obstruction of justice. See, *e.g.*, Jeffrey Toobin, *End Run at Enron: Why the Country's Most Notorious Executives May Never Face Criminal Charges*, New Yorker, Oct. 27, 2003, at 48 (a federal investigator stated that in Enron's aftermath, "'[w]e made Andersen our first case because it was easy and it was obvious'"). With a single stroke, and absent any showing of conduct that a reasonable person would know to be criminal, the government destroyed an important actor in a vital sector of the United States economy. As one commentator observed:

> [T]he attitude was Arthur Andersen got what it deserved.
>
> The question is: What is Arthur Andersen and *who* got what they deserved? You know, some secretary in Des Moines that doesn't have a job now or some junior auditor in Atlanta? I mean, that's who got punished. There is no such thing as Arthur Andersen and there is no such thing as Enron. You can't punish a legal entity.[12]

To be sure, enforcement of the obstruction of justice laws against corporations may serve the overall social good and benefit the economy by ensuring that shareholders are protected and markets remain competitive. In this case, however, an extravagant legal theory, tried and imposed

[12] ABI Roundtable Discussion, *Remember When – Recollections of a Time When Aggressive Accounting, Special Purpose Vehicles, Asset Light Companies and Executive Stock Options Were Positive Attributes*, 11 Am. Bankr. Inst. L. Rev. 1, 10-11 (2003) (footnotes omitted) (emphasis supplied).

without sufficient *mens rea* protections, irreparably damaged individual lives and American business. Andersen disappeared because an incorrect and overbroad legal standard was applied.

Individuals and businesses need to know what they must do to comply with the law on the obstruction of justice; for that reason, the courts of appeals must apply the rule of lenity and related interpretive principles in the application of § 1512(b) and other ambiguous criminal laws. Unless these principles are rigorously observed, increasingly aggressive prosecutions of white-collar crime will inflict incalculable economic and intangible harm on businesses, their employees and their shareholders. Only Congress should make fundamental policy choice and nothing in § 1512(b) reflects that Congress did so there.

CONCLUSION

For all of these reasons, and those stated by petitioner, the decision of the court of appeals should be reversed.

Respectfully submitted,

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